Supreme Court, U.S.
FILED
AUG 4 - 2006
OFFICE OF THE CLERK

No. 06- 06-211

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas R. Burke
DAVIS WRIGHT TREMAINE LLP
One Embarcadero Center
Suite 600
San Francisco, CA 94111

Rochelle L. Wilcox
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa St.
Suite 2400
Los Angeles, CA 90017

Thomas C. Goldstein
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036-1564
(202) 887-4060

James P. Harrison
LAW OFFICE OF JAMES P. HARRISON
980 Ninth Street, 16th Floor
Sacramento, CA 95814

Counsel for Petitioner

QUESTION PRESENTED

The Transportation Security Agency (TSA) uses a directive that it claims requires airline passengers, as a prerequisite to boarding a flight, to show identification or undergo further security screening. This directive affects millions of airline passengers each year. The government acknowledges not only the directive's existence, but also its purported contents. TSA nonetheless refuses to actually disclose the directive.

The Question Presented is:

May the government keep secret a directive that is generally applicable to millions of passengers every day notwithstanding that it (i) has acknowledged both the directive's existence and its contents, and moreover (ii) has identified no special circumstance that nonetheless justifies secrecy.

RULE 14.1(B) STATEMENT

Petitioner, who was Plaintiff below, is John Gilmore.

Respondents, who were Defendants below, are Alberto R. Gonzales, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Marion C. Blakely, in her official capacity as Administrator of the Federal Aviation Administration; Kip Hawley, in his official capacity as Director of the Transportation Security Administration; Michael Chertoff, in his official capacity as Secretary of the Office of Homeland Security; and Southwest Airlines. In addition, Maria Cino, in her official capacity as Secretary of Transportation, is Respondent herein, having replaced Norman Mineta, former Secretary of Transportation, who was Defendant below, pursuant to Fed. R. Civ. P. 25(d)(1).

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 14.1(b) STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 9

A. The Government's Insistence on Deeming the Directive a "Secret" – Notwithstanding That It Acknowledges the Directive's Existence and Its Contents – Violates Due Process 10

B. Alternatively, This Court Should Reject the Court of Appeals' Determination That the Directive Is SSI and Hence Immune from Disclosure 18

CONCLUSION 21

APPENDIX

TABLE OF AUTHORITIES

Cases:

City of Chicago v. *Morales*, 527 U.S. 41 (1999) 11

Cox v. *U.S. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978) 12, 13, 20

Cuneo v. *Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973) 21

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568 (1988) 18

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) 12

Hurtado v. *California*, 110 U.S. 516 (1884) 14

Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 11

Malinski v. *New York*, 324 U.S. 401 (1945) 14

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 10

NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) 19

National Treasury Employees' Union v. *U.S. Customs Serv.*, 802 F.2d 525 (D.C. Cir. 1986) 20

New York Times Co. v. *United States*, 403 U.S. 713 (1971) 11, 12

Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 11

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 12, 13

Screws v. *United States*, 325 U.S. 91 (1945) 11

Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 14

Sterling Drug Inc. v. *F.T.C.*, 450 F.2d 698 (D.C. Cir. 1971) 19

Stokes v. *Brennan*, 476 F.2d 699 (5th Cir. 1973) 20

Tax Analysts v. *I.R.S.*, 117 F.3d 607 (D.C. Cir. 1997) 19, 20

Town of Arcadia v. *Ohio Power Co.*, 498 U.S. 73 (1990) 18

United States v. *Aarons*, 310 F.2d 341 (2d Cir. 1962) 20

United States v. *Williams*, 504 U.S. 36 (1992) 18

United States Dep't of Justice v. *Reporters' Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 19

United States Nat'l Bank of Ore. v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439 (1993) 18

Zadvydas v. *Davis*, 533 U.S. 678 (2001) 18

Constitutional Provisions, Statutes, and Regulations:

U.S. Const. amend. V 1

Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. 203(2)) 2

5 U.S.C. 552(a)(1)(D) 3, 19

28 U.S.C. 1254(1) 1

28 U.S.C. 1631 7

44 U.S.C. 1505(a) 2

44 U.S.C. 1507 ..... 2, 3

49 U.S.C. 114(s) ..... *passim*

49 U.S.C. 40119 ..... 1, 2, 3

49 U.S.C. 44901(a) 2

49 U.S.C. 44902(a) 1, 2

49 U.S.C. 46110 6

1 C.F.R. 1.1 3

49 C.F.R. 1520.5 ..... 1, 3, 4

49 C.F.R. 1542.303 ..... 1, 4

Protection of Sensitive Security Information, 69 Fed. Reg. 28066 (May 18, 2004) 7

Other Authority:

1677 Concessions and Agreements of West New Jersey, in SOURCES OF OUR LIBERTIES (R. Perry ed. 1959) 13

1 Bentham, *Rationale of Judicial Evidence* (1827) 12

Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM (Bowring ed. 1843) 13

Blackstone, *Of the Nature of Laws in General*, in COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769) 15

BREYER, ACTIVE LIBERTY (2005) 11

Burton, *Introducti[illegible]o the Study of the Works of Jeremy Benth[illegible]n* 1 WORKS OF JEREMY BENTHAM (Bowring ed. 1843) 13

Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131 (2006) 14

FULLER, THE MORALITY OF LAW (1964) 13, 14

JENKS, A SHORT HISTORY OF ENGLISH LAW (1922) 16, 17

Krāus, *Democratic Community and Publicity*, in II NOMOS, COMMUNITY (Friedrich ed. 1959) 12

Merriam-Webster Online Dictionary, available at http://m-w.com/dictionary/ information 19

Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957) 11, 12

Relyea, *The Coming of Secret Law*, 5 GOV'T INFO Q. 97 (1988) 14, 15

Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 (1984) 12

Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889 (1986) 12

Treasures in Full – Magna Carta, available at http://www.bl.uk/treasures/magnacarta/translation.html 17

6 WRITINGS OF JAMES MADISON (1906) 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Gilmore respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Gilmore* v. *Gonzales, et al.*, No. 04-15736.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 435 F.3d 1125. Pet. App. 1a-26a. The relevant order of the district court, Pet. App. 27a-41a, is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on January 26, 2006. Pet. App. 2a. A timely petition for rehearing was denied on April 5, 2006. Pet. App. 42a. Justice Kennedy extended the time for filing a petition for a writ of certiorari until August 4, 2006. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The relevant statutes and regulatory provisions – 49 U.S.C. 114(s), 40119, 44902 and 49 C.F.R. 1520.5, 1542.303 – are reproduced at Pet. App. 43a-54a.

STATEMENT OF THE CASE

Petitioner, attempting to board a domestic flight, was advised that he was required to show identification. This rule is applied hundreds of millions of times every year. The government has acknowledged that this requirement is imposed by a directive,

and has further acknowledged what it claims are the directive's contents. But it nonetheless insists on keeping the directive secret. Petitioner brought this suit, alleging that it is unlawful to impose a legal requirement on an individual and acknowledge the source and content of the requirement, but simultaneously withhold the basis for that legal duty. The lower courts rejected that claim.

1. Various statutory provisions govern airport security screening. The Under Secretary of Transportation is directed to "provide for the screening of all passengers and property." 49 U.S.C. 44901(a). In addition, the Under Secretary must direct airlines to "refuse to transport * * * a passenger who does not consent to a search * * * establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive or other destructive substance." *Id.* § 44902(a).[1] Neither of these statutes mentions passenger identification.

Other provisions of federal law govern the question of whether legal requirements – such as those governing security screening – must be made public. Congress has generally forbidden the use of secret law. For example, the Federal Register Act – which dates to 1935 – requires the disclosure of all "Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof." 44 U.S.C. 1505(a). Under the statute, "every document or order which prescribes a penalty has general applicability and legal effect." *Ibid.* Section 1507 further provides that "[a] document required by section 1505(a) of this title to be published in the

[1] The Under Secretary was originally the head of the TSA. Congress later transferred the responsibilities of the Under Secretary and the TSA from the Department of Transportation to the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. 203(2)).

Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title." An implementing regulation explains that a rule of general applicability is "any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public * * *." 1 C.F.R. 1.1. The Freedom of Information Act (FOIA) similarly requires publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D).

There are narrowly tailored exceptions to the requirement of disclosure. 49 U.S.C. 114(s) provides that notwithstanding FOIA, TSA is authorized, upon making particular findings, to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act * * * or under chapter 449 of this title * * *." 49 U.S.C. 114(s). These findings include a required administrative determination that disclosure is inappropriate for specified reasons, principally because it would "be detrimental to the security of transportation." *Ibid.* See also *id.* § 40119(b)(1) (parallel provision governing Department of Homeland Security, Secretary of Transportation, similarly authorizing nondisclosure upon such a finding of "information obtained or developed in ensuring [transportation] security").

TSA's implementing regulations address "sensitive security information" (SSI) that the agency will refuse to disclose pursuant to the just-cited statutory provisions. The regulations define SSI to include, for example, all "[t]hreat information,"

"[s]ecurity measures," and "[s]ecurity screening information." 49 C.F.R. 1520.5(b)(7)-(9). But the regulations go further to define as SSI "[a]ny Security Directive or order" issued under relevant regulatory provisions, together with "[a]ny comments, instructions, and implementing guidance pertaining thereto." *Id.* § 1520.5(b)(2). A "Security Directive" is the document setting forth "mandatory measures" that airports and TSA personnel must follow in conducting airport screening. *Id.* § 1542.303(a). Every "Security Directive or Information Circular, and information contained in either document," is forbidden to be disclosed "to persons other than those who have an operational need to know." *Id.* § 1542.303(f)(2).

2. This case involves the TSA requirement that all passengers show identification before they are permitted to board a domestic commercial airline flight in the United States. The government categorically refuses to make public the document that imposes this legal obligation on commercial airline passengers.

The "secrecy" surrounding this directive is quite unusual in two respects. First, although the *document* itself is withheld from public disclosure, *its requirements* are disclosed every day to millions of people, who are advised that they must show identification.[2] Thus, the government's "secrecy" does not involve keeping sensitive information non-public. What is at stake is instead the government's refusal to prove that what it claims is the law is, in fact, required.

Second, and relatedly, it appears that the directive or implementing guidance purposefully or inadvertently causes transportation security officials to mislead the public.

---

[2] This is true with the caveat that (as discussed in the next paragraph) the public is misinformed that it must provide identification, when passengers actually have the alternative option of undergoing additional security screening. But this alternative option is not a secret; the government acknowledged it in the course of this litigation. See *infra* at p. 8.

Passengers are consistently advised that federal law requires them to show identification. That representation is false, however. There is another option. Passengers in reality can generally travel even without showing proper identification so long as they undergo a more extensive security screening. The government's "secrecy" here in refusing to disclose the actual directive thus has the effect of misinforming the public of what the law actually requires.

3. Petitioner John Gilmore was one of the founding employees of Sun Microsystems. On Independence Day 2002 he twice attempted to board flights to the nation's capital, once from San Francisco and once from Oakland, California. Pet. App. 5a-6a. The purpose of the trip was to "petition the government for redress of grievances – specifically, the requirement for airline travelers to provide identification." C.A. E.R. 5 (Complaint).

At both airports, petitioner observed standard security signage, which states the following: "Notice From the Federal Aviation Administration: PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." C.A. E.R. 6 (Complaint); Pet. App. 6a. Consistent with that requirement, petitioner repeatedly was directed to show identification. In response to his inquiries, he was sometimes advised that he must show official identification to fly, and other times advised that he could still travel if he underwent further screening. His requests to see the document imposing the identification requirement were denied. Gilmore was refused the right to travel on one airline, despite having been physically searched, because he did not show his identification. He would not consent to the more invasive search demanded by the other airline in lieu of showing his identification, and was refused the right to travel there as well. Gilmore has not flown domestically since.

Two weeks after these events, petitioner brought this suit. Petitioner's complaint alleged, *inter alia*, that the government could not lawfully withhold the directive requiring passengers to present identification. The district court held that it lacked jurisdiction over the principal elements of petitioner's suit, which it concluded was a challenge to TSA and FAA regulations that must be filed in the court of appeals. Pet. App. 32a, 33a-34a (citing 49 U.S.C. 46110). Because the government would not disclose the directive even to the district judge, the court recognized that it was "unable to conduct any meaningful inquiry as to the merits" of petitioner's claim that the regulatory scheme is void for vagueness. *Id.* 34a. The district court recognized petitioner's contention that the directive implicates his right to travel and his First Amendment right to association, but held that those rights were not sufficiently impinged to be violated. *Id.* 38a-40a.

4. Petitioner sought review in the Ninth Circuit. In that court, the government sought leave to file the directive under seal for *in camera* review. Counsel for the government suggested their own apparent regret for their inability to provide the court or petitioner with the directive itself. See Mot. to File Materials and Opposing Brief Under Seal, for *In Camera* and *Ex Parte* Review, at 1-2, 7-8. The categorical prohibition on disclosing SSI, they advised the court of appeals, made any other course impossible. See *id.* at 2, 4.

The court of appeals denied that motion but later requested, over the objections of petitioner and the media amici, that the government file under seal relevant material pertaining to the identification requirement. Order, *Gilmore* v. *Gonzales*, No. 04-15736 (Dec. 8, 2005). On the basis of that material, the Ninth Circuit agreed that jurisdiction in the first instance was appropriately before it. It specifically concluded that the directive was an administrative order, which by statute may be challenged only through a petition for review in the court of appeals. Pet. App. 12a-13a & n.8 (citing 49 U.S.C. 46110).

The Ninth Circuit further concluded that it should reach the merits of petitioner's claims because it was appropriate to transfer the case from the district court to the court of appeals. Pet. App. 13a-14a (citing 28 U.S.C. 1631). On the basis of its "determin[ation] that the Security Directive constitutes SSI," the court of appeals also concluded that the directive does "not have to be disclosed to [petitioner]." Pet. App. 13a n.8.

With respect to the contents of the directive, the government acknowledged that, despite its previous claims that complete secrecy was required, it had publicly acknowledged the directive's existence, and some of its substance. Brief of United States, *Gilmore* v. *Ashcroft*, No. 04-15736 (9th Cir. filed Sept. 30, 2004), available at 2004 WL 2448094, at *14-*15 ("U.S. C.A. Br."). A Federal Register entry thus states:

> TSA may publicly release some SSI to help achieve compliance with security requirements. For instance, as part of its security rules, TSA requires airlines to ask passengers for identification at check-in. Although this requirement is part of a security procedure that is SSI, TSA has released this information to the public in order to facilitate the secure and efficient processing of passengers when they arrive at an airport. In this type of situation, TSA must determine whether releasing certain portions of security procedures will improve transportation security to a greater extent than maintaining the confidentiality of the procedure.

Protection of Sensitive Security Information, 69 Fed. Reg. 28066, 28070-71 (May 18, 2004).

The government went further than the Federal Register entry, however, and acknowledged that the directive provides an alternative to providing identification: "Millions of people

board airplanes every year and routinely show identification before boarding. * * * In the alternative, a passenger can submit to a more extensive search rather than show identification." U.S. C.A. Br., 2004 WL 2448094, at *15. See also *id.* at *16 ("the only reason [petitioner] was not permitted to [board] was that he refused to either show identification or submit to a search").[3] The court of appeals, having reviewed the directive, similarly described "the Government's civilian airline passenger identification policy" as "requir[ing] airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter." Pet. App. 3a. See also *id.* 12a (directive "require[es] airline passengers to present identification or be a 'selectee'").

The court of appeals recognized that "Gilmore's claims * * * implicate the rights of millions of travelers" (Pet. App. 14a), but rejected his contention that the directive violates due process. First, the court of appeals reasoned, the directive is not impermissibly vague because it is not "penal in nature," in that it "does not impose any criminal sanctions, or threats of prosecution, on those who do not comply. Rather, it simply prevents them from boarding commercial flights." Pet. App. 17a. Second, petitioner "had actual notice of the identification policy." *Ibid.* The court of appeals – apparently disclosing the *actual* requirements of the directive – found it decisive that airline personnel "told him that in order to board the aircraft, he must either present identification or be subject to a 'selectee' search." *Ibid.* The court further concluded that "because all passengers must comply with the identification policy" it had

---

[3] The government erred in making this assertion. A Southwest employee at the boarding gate turned Gilmore away, and gave his seat to another passenger – without offering Gilmore a search alternative – because Gilmore did not present his identification to that employee, contrary to the TSA's secret directive. C.A. E.R. 5 (Complaint).

publicly described, "the policy does not raise concerns of arbitrary application." *Id.* 18a. Like the district court, the court of appeals acknowledged that the directive affects petitioner's ability to exercise his right to travel and his right to assemble and petition the government, but held that neither was sufficiently implicated to be deemed violated. *Id.* 18a-21a, 24a-26a.

5. After the court of appeals denied rehearing en banc, this petition followed.

REASONS FOR GRANTING THE WRIT

This case presents a profound question of federal law in a context that directly affects millions of individuals every day. The government has promulgated a directive that requires individuals to provide identification or undergo additional security screening before boarding a domestic airline flight. The government moreover acknowledged to the Ninth Circuit the directive's existence and its contents (although it still mischaracterizes the contents of that directive to the public). But it nonetheless refuses to actually release the directive, despite failing to offer *any* justification for its secrecy. The government's position, and the court of appeals' decision sustaining it, is contrary to basic due process principles. Under our system of laws, it is not sufficient for the Executive, charged under the Constitution with administering the laws, simply to *assure* the public as to what the law requires. That inevitably results in arbitrary enforcement of the law. There instead is a basic due process right to actually *see* the law. Stripped of that right, individuals are seriously disadvantaged in their ability to protect their rights in a court of law, debate existing policy and petition the government for change.

This is moreover the ideal case in which to take up the question whether the government may, without special justification, promulgate "secret law." The facts perfectly

illustrate the dangers that such secrecy creates, for the government continues to misrepresent the law to millions of passengers every day. The standard security signage, which petitioner encountered, falsely states that passengers "MUST PRESENT IDENTIFICATION." Pet. App. 6a. As recently as March 2006, TSA's web-site advised would-be travelers:

> If you have a paper ticket for a domestic flight, passengers age 18 and over must present one form of photo identification issued by a local state or federal government agency (e.g.: passport/drivers license/military ID), or two forms of non-photo identification, one of which must have been issued by a state or federal agency (e.g.: U.S. social security card). * * *
>
> For e-tickets, you will need to show your photo identification and e-ticket receipt to receive your boarding pass.

Pet for Rhg. Addendum, at 1. The directive moreover directly implicates airline passengers' constitutional rights to travel and assemble. The need for openness, rather than secrecy, is accordingly at the apex in this case.

Certiorari should be granted, and the judgment reversed.

A. The Government's Insistence on Deeming the Directive a "Secret" – Notwithstanding That It Acknowledges the Directive's Existence and Its Contents – Violates Due Process.

1. "[A] government of laws, and not of men," the great Chief Justice wrote, is the "very essence of civil liberty." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But we are only a government of laws if the citizenry is genuinely informed about the law's requirements. Liberty cannot thrive if the laws

that can strangle it can freely be hidden from public view, debate, and challenge. Our "democratic decision-making institutions" cannot function if the citizenry is deprived of the information it needs in order to evaluate governmental policies. BREYER, ACTIVE LIBERTY 39 (2005).

That principle is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments. The predicate to the many decisions of this Court and others prohibiting the enforcement of vague laws is the fundamental principle that the public is entitled to know the terms of the laws being enforced against it. "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'" *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939)). As this Court has explained, "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999). Indeed, the enforcement of laws which do not adequately convey their terms "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'" *Screws* v. *United States*, 325 U.S. 91, 96 (1945) (citation omitted).

"Secrecy in government is fundamentally anti-democratic * * * ." *New York Times Co.* v. *United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring). Secret law not only transgresses basic norms of fairness, but also is flatly inconsistent with the very form of government established by the Constitution. "The general availability of government information is the fundamental basis upon which popular sovereignty and the consent of the governed rest." Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1957). Governmental openness is key to the preservation of

democratic government because "[w]ithout publicity, all other checks [on government] are insufficient * * *." 1 Bentham, *Rationale of Judicial Evidence* 524 (1827), quoted in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 596 (1980). Openness and publicity "appear[ed] to [Bentham] the strongest shield against temptations, the strongest incentive for maintaining responsibility." Kraus, *Democratic Community and Publicity*, in II NOMOS, COMMUNITY 248 (Friedrich ed. 1959) (citing Bentham, *Essay on Political Tactics in Political Assemblies*).

Ultimately, secrecy stands in the way of what the Founders considered to be the most important check on governmental power: a knowledgeable citizenry. An "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). Perhaps "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government." *New York Times Co.*, 403 U.S. at 728 (Stewart, J., concurring). In a system in which "information is kept secret, public deliberation cannot occur [and] the risks of self-interested representation and factional tyranny increase dramatically." Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 894 (1986). See also Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 398 (1984) ("[p]ublic laws * * * restrain official arbitrariness that otherwise might interfere with individual decisionmaking"). "An unlimited power to withhold information could be used in a way that would destroy government by consent, the separation of powers, checks and balances, and the creative and disciplinary role of free inquiry." Parks, *Open Government Principle*, at 10. See also *Cox* v. *U.S. Dep't of Justice*, 576 F.2d 1302, 1309 (8th Cir. 1978) ("[f]ar

from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law"). Secret law thus is contrary to the very underpinning of our constitutional form of government.

As Jeremy Bentham recognized, secrecy undermines the very purpose of a society's laws: "That a law may be obeyed, it is necessary that it should be known." Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM 157 (Bowring ed. 1843). Bentham "considered that every practicable means should be adopted for bringing before the eyes of the citizen the laws he is called on to obey." Burton, *Introduction to the Study of the Works of Jeremy Bentham*, in 1 WORKS OF JEREMY BENTHAM 58. "If your laws of procedure favour the impunity of crimes; if they afford means of eluding justice, of evading taxes, of cheating creditors, it is well that they remain unknown. But what other system of legislation besides this will gain by being unknown?" Bentham, *Of Promulgation of the Laws*, in 1 WORKS OF JEREMY BENTHAM 158. We expect all citizens to conform their behavior to the law's dictates, but "there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him * * *." FULLER, THE MORALITY OF LAW 39 (1964). "The internal morality of the law demands that there be rules [and] that they be made known * * *." *Id.* at 157.[4]

---

[4] An analogy is also fairly drawn to the First Amendment principle of open court proceedings. "The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 n.9 (1980) (citation omitted). As one early American source observed, "justice may not be done in a corner nor in any covert manner." *1677 Concessions and Agreements of West New Jersey*, in SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959).

2. The nation's history compels the same conclusion. "The safeguards of 'due process of law' * * * summarize the history of freedom of English-speaking peoples running back to the *Magna Carta* and reflected in the constitutional development of our people." *Malinski* v. *New York*, 324 U.S. 401, 413-414 (1945) (Frankfurter, J., concurring). Thus, a governmental practice that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," violates due process. *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). See also *Hurtado* v. *California*, 110 U.S. 516, 535 (1884) (due process identified with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

Open and published laws are a basic building block of our constitutional form of government, "rooted in the traditions and conscience of our people." *Snyder*, 291 U.S. at 105. Thus, it is no surprise that the Founders viewed openness as an absolute requirement of the system of government they sought to establish. As James Madison recognized, echoing Bentham, "the right of freely examining public characters and measures, and of free communication thereon, is *the only effective guardian of every other right.*" 6 WRITINGS OF JAMES MADISON 398 (1906) (emphasis added). Accord FULLER, MORALITY OF LAW, at 149 ("from the first," our Founders "assumed as a matter of course that laws ought to be published"); Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 139-140 (2006) ("open government is among the basic principles on which this nation was founded"); Relyea, *The Coming of Secret Law*, 5 GOV'T INFO Q. 97, 97 (1988) ("[p]ublication of the law * * * constitutes a foundation stone of the self-government edifice").

To ensure that the laws were published and available to citizens, the first Congress ordered the Secretary of State to "'cause every [enacted] law, order, resolution, and vote to be

published in at least three of the public newspapers printed within the United States.'" Relyea, *The Coming of Secret Law*, at 98 (quoting 1 Stat. 68). Ten years later, Congress modified that mandate and requested that the Secretary of State publish its enactments in "at least * * * one of the public newspapers printed within each state" or more, if necessary to insure that the public was informed. *Id.* at 99. Similarly, in 1795, Congress authorized the Secretary to State to arrange for the publication of 5,000 sets of the statutes passed since 1789, and the same number for each successive sitting of Congress. *Ibid.* "All except 500 of these sets were to be distributed to the states and territories 'to be deposited in such fixed and convenient place in each county'" that would be the "'most conducive to the general information of the people.'" *Ibid.* (quoting 1 Stat. 443). From the very beginning, then, Congress established official, routine publication and distribution of the laws.

The Founders' perspective was rooted in the settled principle that secret law was inimical to a free society. Blackstone emphasized that laws must be "*prescribed*" because "a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be *properly a law*." Blackstone, *Of the Nature of Laws in General*, in COMMENTARIES ON THE LAWS OF ENGLAND (1765-1769) (second emphasis added). Rather, "[i]t is requisite that this resolution be notified to the people who are to obey it * * * in the most public and perspicuous manner." *Ibid.* Blackstone, too, warned against Caligula's attempts to enforce laws that nobody could see. *Ibid.* To Blackstone, a secret law was no law at all.

The development of English law, and England's consistent early practice of committing laws to writing, available to the public, establish that this tradition has deep, well-established roots in the common law. Indeed, the first significant work known, the "English Laws," comprised a small series of books apparently prepared nearly nine hundred years ago, in 1115;

the "Laws of Henry I" followed in approximately 1118. JENKS, A SHORT HISTORY OF ENGLISH LAW 18 (1922). Jenks traces the ancient development of law in England, and the many works published to catalogue those laws. *Id.* at 18-25. Included among these ancient laws are the Assises – formal regulations – "made by the King for the direction of his officials." *Id.* at 23. Jenks explains that although "in theory, they did not profess to affect the conduct of the ordinary citizen," in practice they had a "substantial effect in that direction; because the royal officials, in their dealings with private persons, acted upon them, and took good care that they should control the course of business." *Ibid.* Of these Assises, dating between 1166 and 1184, Jenks declares that "it is hardly possible to exaggerate the importance for this period." *Id.* at 23-24.

Jenks describes as "[t]he second great triumph" of the early English development of law "the establishment of a new set of royal tribunals, with a definite legal procedure" – the writ. *Id.* at 39. Through the Assises, England had begun to catalogue substantive law, applicable to the public. *Id.* at 40-41. But this was not enough. Until the establishment of the writ procedure, "the definition of offences had been left to the 'doomsmen' of the court, in whose memory was supposed to lie a store of immemorial wisdom. There were no written records; nothing to which the aggrieved party could turn, to see whether the court would give him a remedy." *Id.* at 44-45. Jenks explains that with a writ, however, "[n]ow, he knew that if he could get his complaint described in a royal message, he could hardly be met by the defence that such complaint 'disclosed no cause of action.'" *Id.* at 45. Jenks declared that "it was a great step gained to have it declared, or at least implied, that, if the facts were as alleged, the plaintiff had a good ground of complaint; and this result was achieved when it was clear that any one could have, as of course, a writ of Debt, or Trespass, or the

like." *Ibid.* This procedure was well entrenched "before the end of the twelfth century." *Ibid.*

Ultimately, the writs "'original,' *i.e.* writs destined to commence legal proceedings," "were collected into a Register, of which more or less correct copies were in circulation," which "really became a dictionary of the Common Law." *Ibid.* In that same time period – approximately 1215 – the *Magna Carta*, the historic compilation of English law, was published. See *Treasures in Full – Magna Carta*, available at http://www.bl.uk/treasures/magnacarta/translation.html (last visited Aug. 1, 2006). Thus, by 1250, with the adoption of the *Magna Carta* and the making and circulation of the writs, publication of the English common law had begun. See JENKS, SHORT HISTORY OF ENGLISH LAW, at 45. Over the next hundred years, these laws were codified in statutes designed to structure life in the middle ages. *Id.* at 131 (statute enacted in 1330 to govern estate law); 146 (clause in the statute of 1315 governs defamation law); 150 ("the great Statute of Treasons" was codified in 1352). In short, during the hundred years before the United States was founded, written law flourished in England, with statutes, judicial decisions and executive orders being published and updated regularly. *Id.* at 187-190.

3. The foregoing authorities establish that the government cannot, consistent with Due Process, maintain "secret law" without some special justification, such as a legitimate need for secrecy to protect national security. The facts of this case plainly involve no special justification; indeed, the court of appeals required the government to provide no basis whatsoever for the continued secrecy of the directive. Nor could a persuasive justification be offered, for in the court of appeals the government acknowledged what it claims is the substance of the directive's requirements. In these circumstances, the government cannot justify its continued secrecy. Rather, the public is entitled to demand more than the Executive's assurances regarding what the law requires.

Forbidden from seeing the directive, the public is seriously disadvantaged in understanding, assessing, and debating its requirements (including any changes in its requirements), all of which lie at the heart of the democratic process. More fundamentally, the government may not *enforce* any law against the general public if it denies the public the right to see that law, absent special justification.

B. Alternatively, This Court Should Reject the Court of Appeals' Determination That the Directive Is SSI and Hence Immune from Disclosure.

The grave constitutional question raised by the government's illogical position in this case is easily avoided. This Court could simply reverse the Ninth Circuit's determination (Pet. App. 13a n.8) that the directive is properly withheld from public disclosure as SSI. Settled principles of constitutional avoidance counsel in favor of adopting that course. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[5]

As discussed *supra* at pp. 2-3, Congress has broadly provided that generally applicable laws and regulations must be publicly disclosed. The statutes governing transportation security contain limited exceptions to those requirements, for certain regulations. As is relevant here, TSA may "prescribe

---

[5] Because this issue was "passed upon" by the court of appeals, it is within this Court's jurisdiction. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The issue is also logically antecedent to the constitutional question decided by the court of appeals and therefore appropriately before this Court for decision. See *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 440 (1993) ("a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even if the parties fail to identify and brief the issue"); *Town of Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990) (considering issue logically antecedent to those decided by court of appeals).

regulations prohibiting the disclosure of *information* obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act or under chapter 449 of this title." 49 U.S.C. 114(s) (emphasis added). Secrecy is permitted only if TSA makes a further finding justifying nondisclosure – in this context, a finding that disclosure would "be detrimental to the security of transportation." *Ibid.*

The directive fails *both* of the requirements imposed by Congress for deeming materials relating to transportation security to be secret. The directive is not reasonably understood as "information," which is commonly defined as "the communication or reception of knowledge or intelligence"; "knowledge obtained from investigation, study, or instruction"; "intelligence, news"; and, "facts, data." Merriam-Webster Online Dictionary, available at http://m-w.com/dictionary/information (last visited Aug. 1, 2006). Nor does anything in the legislative history for Section 114(s) suggest that Congress intended "information" to be interpreted broadly enough to encompass laws that govern the conduct of the general public. Instead, the directive is a "substantive rule[] of general applicability" that must be disclosed. 5 U.S.C. 552(a)(1)(D).[6]

---

[6] See *Sterling Drug Inc.* v. *F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971) ("[t]hese are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public"). As this Court explained in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975), FOIA "represents a strong congressional aversion to 'secret [agency] law' * * * and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'" (citations omitted; insertion in original.) Indeed, "[FOIA's] indexing and reading-room rules indicate that the primary objective is the elimination of 'secret law.' Under the FOIA an agency must disclose its rules governing relationships with private parties and its demands on private conduct." *U.S. Dep't of Justice* v. *Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (citation omitted); accord *Tax Analysts* v. *I.R.S.*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("[a] strong theme of our [deliberative

More importantly, it is not plausible for TSA to argue that the directive must be kept secret in order to maintain the "security of transportation." 49 U.S.C. 114(s). The government has never explained how the withholding of the directive document – as opposed to the substance of its requirements – in any way enhances security. By the time of its filings in the court of appeals, the government was willing to freely acknowledge what it claims the directive requires. But it inexplicably refuses to release the actual document that contains those requirements.[7]

The unacceptable result of the government's insistence on secrecy for the directive itself is that the directive has been arbitrarily enforced, with some airline personnel enforcing the directive as reflected on signs in every airport in the nation (requiring identification to fly commercially) and others

---

process] opinions has been that an agency will not be permitted to develop a body of 'secret law'") (citations, quotation marks omitted); *Nat'l Treasury Employees' Union* v. *U.S. Customs Serv.*, 802 F.2d 525, 531 (D.C. Cir. 1986) (FOIA "[e]xemption (b)(2) emphatically does not authorize the promulgation of 'secret law' governing members of the public, and such documents would be unprotected whether or not disclosure threatened to make them operationally obsolete").

Thus, courts generally have agreed that all generally applicable laws – regardless of how they are characterized – must be published. See, *e.g.*, *United States* v. *Aarons*, 310 F.2d 341, 345-346 (2d Cir. 1962) (order closing portion of harbor while submarine launched "prescribed 'a course of conduct' for 'the general public' or 'the persons of a locality'" and therefore "publication was required"); *Cox*, 576 F.2d at 1309 (portions of agency manual "clarifying substantive or procedural law must be disclosed" under FOIA); *Stokes* v. *Brennan*, 476 F.2d 699, 703 (5th Cir. 1973) (training manual describing agency's implementation of statute must be disclosed under FOIA).

[7] In the briefing before the court of appeals, counsel to the government declined to release the directive based only on the flat statutory prohibition on releasing any material that TSA had deemed to be SSI, not out of any expressed concern that disclosure would in fact endanger transportation security. See *supra* at p. 6.

apparently enforcing the directive as purportedly written (permitting commercial air travel without identification if the traveler submits to a more extensive search). No good reason exists for the government claim that it is entitled to withhold the directive from the public, particularly in the face of consistent caselaw from this Court and other federal courts mandating that all generally applicable laws be published.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas R. Burke
DAVIS WRIGHT TREMAINE LLP
One Embarcadero Center
Suite 600
San Francisco, CA 94111

Rochelle L. Wilcox
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa St.
Suite 2400
Los Angeles, CA 90017

Thomas C. Goldstein
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036-1564
(202) 887-4060

James P. Harrison
LAW OFFICE OF JAMES P. HARRISON
980 Ninth Street, 16th Floor
Sacramento, CA 95814

Counsel for Petitioner

August 2006

---

[8] Nor is there any basis to object to disclosure on the ground that the directive contains *other* information that must be kept secret. The statutorily required finding that secrecy is necessary for security applies to the "information" in question, not the directive as a whole. 49 U.S.C. 114(s). Laws that otherwise must be disclosed may not be shielded by burying them among secrets. Other information within the directive that is properly withheld can simply be redacted. Cf. *Cuneo* v. *Schlesinger*, 484 F.2d 1086, 1090-1091 (D.C. Cir. 1973) (ordering disclosure of portions of manual that "either create or determine the extent of the substantive rights and liabilities of a person affected by those portions").

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE,

Plaintiff-Appellant,

v.

ALBERTO R. GONZALES, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; NORMAN MINETA, in his official capacity as Secretary of Transportation; MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; UAL CORPORATION, aka United Airlines; SOUTHWEST AIRLINES; MARION C. BLAKELY, in her official capacity as Administrator of the Federal Aviation Administration; KIP HAWLEY, in his official capacity as Director of the Transportation Security Administration,

Defendants-Appellees.

No. 04-15736

D.C. No.
CV-02-03444-SI

OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
December 8, 2005 – San Francisco, California

Filed January 26, 2006

Before: Stephen S. Trott, Thomas G. Nelson, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez

COUNSEL

William M. Simpich, Oakland, California; James P. Harrison, Sacramento, California, for the plaintiff-appellant.

James P. Rathvon, Piper Rudnick LLP, Washington, D.C.; Jane H. Barrett, Piper Rudnick LLP, Los Angeles, California, for the defendant-appellee Southwest Airlines Co.

Peter D. Keisler, Assistant Attorney General; Kevin V. Ryan, United States Attorney; Douglas N. Letter and Joshua Waldman, Department of Justice, Washington, D.C., for defendants-appellees Alberto R. Gonzales, Attorney General, et al.

Lee Tien and Kurt Opsahl, San Francisco, California, for amicus Electronic Frontier Foundation.

Marc Rotenberg and Marcia Hofmann, Washington, D.C., for amicus Electronic Privacy Information Center.

Deborah Pierce and Linda Ackerman, San Francisco, California; Rachel Meeropol, New York, New York, for amici The Center for Constitutional Rights and Privacy Activism.

Reginald T. Shuford and Catherine Y. Kim, New York, New York; Aaron Caplan, Seattle, Washington; Michael E. Kipling, Summit Law Group, Seattle, Washington, for

amici American Civil Liberties Union Foundation and American Civil Liberties Union for Washington.

OPINION

PAEZ, Circuit Judge.

John Gilmore ("Gilmore") sued Southwest Airlines and the United States Attorney General, Alberto R. Gonzales, among other defendants,[1] alleging that the enactment and enforcement of the Government's civilian airline passenger identification policy is unconstitutional. The identification policy requires airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter. Gilmore alleges that when he refused to present identification or be subjected to a more thorough search, he was not allowed to board his flights to Washington, D.C. Gilmore asserts that

---

[1] Gilmore also named the following federal defendants: Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation ("FBI"); Norman Mineta, in his official capacity as Secretary of Transportation; Marion C. Blakely, in her official capacity as Administrator of the Federal Aviation Administration ("FAA"); Kip Hawley, in his official capacity as Director of the Transportation Security Administration ("TSA"); and Michael Chertoff, in his official capacity as Secretary of the Office of Homeland Security. Where necessary, the current federal defendants have been substituted for the originally named defendants pursuant to Fed. R. Civ. P. 25(d)(1). The federal defendants, including Alberto R. Gonzales, are collectively referred to as "the Government."

Southwest Airlines and the Government are collectively referred to as "Defendants." Gilmore also named United Airlines as a defendant. In dismissing this action against Defendants, the district court also dismissed the complaint against United Airlines without prejudice. United Airlines has not appeared in this court.

because the Government refuses to disclose the content of the identification policy, it is vague and uncertain and therefore violated his right to due process. He also alleges that when he was not allowed to board the airplanes, Defendants violated his right to travel, right to be free from unreasonable searches and seizures, right to freely associate, and right to petition the government for redress of grievances.

Before we address the merits of Gilmore's claims, we must consider the jurisdictional and standing issues raised by Defendants. The Government contends that the district court lacked subject matter jurisdiction to entertain this action because, under 49 U.S.C. § 46110(a), Gilmore's claims can only be raised by a petition for review in the courts of appeal. Defendants also contend that Gilmore lacks standing to challenge anything other than the identification policy, such as the Consumer Assisted Passenger Prescreening System ("CAPPS") and so-called No-Fly and Selectee lists. The district court determined that Gilmore had standing to challenge only the identification policy, and that it lacked jurisdiction to hear Gilmore's due process challenge.[2] After reviewing the sensitive security information materials that the Government filed with this court *ex parte* and *in camera*, we agree with the Government that the district court lacked jurisdiction and that Gilmore had standing to challenge only the identification policy.

[2] The district court did not address the jurisdictional issue as it relates to Gilmore's remaining claims, and instead addressed only the merits of these claims.

However, as explained below, we transfer Gilmore's complaint to this court pursuant to 28 U.S.C. § 1631 and treat it as a petition for review. Accordingly, we address the merits of each of Gilmore's constitutional claims with respect to the identification policy. We hold that neither the identification policy nor its application to Gilmore violated Gilmore's constitutional rights, and therefore we deny the petition.

Background

On July 4, 2002, Gilmore, a California resident and United States citizen, attempted to fly from Oakland International Airport to Baltimore-Washington International Airport on a Southwest Airlines flight. Gilmore intended to travel to Washington, D.C. to "petition the government for redress of grievances and to associate with others for that purpose." He was not allowed to fly, however, because he refused to present identification to Southwest Airlines when asked to do so.

Gilmore approached the Southwest ticketing counter with paper tickets that he already had purchased. When a Southwest ticketing clerk asked to see his identification, Gilmore refused. Although the clerk informed Gilmore that identification was required, he refused again. Gilmore asked whether the requirement was a government or Southwest rule, and whether there was any way that he could board the plane without presenting his identification. The clerk was unsure, but posited that the rule was an "FAA security requirement." The clerk informed Gilmore that he could opt to be screened at the gate in lieu of presenting the requisite identification. The clerk then issued Gilmore a new boarding pass, which indicated that

he was to be searched before boarding the airplane. At the gate, Gilmore again refused to show identification. In response to his question about the source of the identification rule, a Southwest employee stated that it was a government law. Gilmore then met with a Southwest customer service supervisor, who told him that the identification requirement was an airline policy. Gilmore left the airport, without being searched at the gate.

That same day, Gilmore went to San Francisco International Airport and attempted to buy a ticket for a United Airlines flight to Washington, D.C. While at the ticket counter, Gilmore saw a sign that read: "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." Gilmore again refused to present identification when asked by the ticketing agent. The agent told him that he had to show identification at the ticket counter, security checkpoint, and before boarding; and that there was no way to circumvent the identification policy. A United Airlines Service Director told Gilmore that a United traveler without identification is subject to secondary screening, but did not disclose the source of the identification policy. United's Ground Security Chief reiterated the need for identification, but also did not cite the source of the policy. The Security Chief informed Gilmore that he could fly without presenting identification by undergoing a more intensive search, i.e. by being a "selectee." A "selectee" search includes walking through a magnetometer, being subjected to a handheld magnetometer scan, having a light body patdown, removing one's shoes, and having one's carry-on baggage searched by hand and a CAT-scan machine. Gilmore refused to allow his bag to be searched by hand and was therefore barred from flying.

The Security Chief told Gilmore that he did not know the law or government regulation that required airlines to enforce the identification policy. Another member of United's security force later told Gilmore that the policy was set out in government Security Directives, which he was not permitted to disclose. He also told Gilmore that the Security Directives were revised frequently, as often as weekly; were transmitted orally; and differed according to airport. The airline security personnel could not, according to the Government, disclose to Gilmore the Security Directive that imposed the identification policy because the Directive was classified as "sensitive security information" ("SSI").[3] Gilmore left the airport and has not flown since September 11, 2001 because he is unwilling to show identification or be subjected to the "selectee" screening process.

Gilmore filed a complaint against Defendants in the United States District Court for the Northern District of California, challenging the constitutionality of several security measures, which he collectively referred to as "the Scheme," including the identification policy, CAPPS and

---

[3] Pursuant to 49 U.S.C. § 114(s)(1)(C) (2005), the Under Secretary of the TSA "shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." This information is called "sensitive security information." 49 C.F.R. § 1520.5(a) (2005). The Under Secretary classified as SSI "[a]ny security program or security contingency plan issued, established, required, received, or approved by DOT [Department of Transportation] or DHS [Department of Homeland Security], including . . . [a]ny aircraft operator, airport operator, or fixed base operator security program, or security contingency plan under this chapter" and "[a]ny Security Directive or order . . . [i]ssued by TSA." 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i) (2005).

CAPPS II, and No-Fly and Selectee lists.[4] Gilmore alleged that these government security policies and provisions violated his right to due process, right to travel, right to be free from unreasonable searches and seizures, right to freely associate, and right to petition the government for redress of grievances. Gilmore also alleged that "similar requirements have been placed on travelers who use government-regulated passenger trains, and that similar requirements are being instituted for interstate bus travel." Defendants filed separate motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure and failure to state a claim upon which relief can be granted under Rule 12(b)(6).

The district court dismissed Gilmore's complaint against Defendants with prejudice. Specifically, the district court dismissed Gilmore's due process claim because it determined that the court lacked jurisdiction to hear it. The district court, however, did not assess whether it had jurisdiction to hear Gilmore's other claims. Instead, it reached the merits of those claims and determined that each one failed. In granting Defendants' motions, the court, noting that the identification policy had been classified as SSI, did not review any official documentation of the identification policy. Rather, for purposes of its jurisdictional ruling, the district court assumed, as Gilmore alleged, that the identification policy was a Security

[4] The No-Fly and Selectee lists are Security Directives. They were issued by TSA pursuant to 49 U.S.C. § 114(*l*)(2)(A) (2005), which authorizes the TSA Under Secretary to issue Security Directives without providing notice or an opportunity for comment in order to protect transportation security.

Directive issued by TSA. Gilmore timely appealed. Shortly after oral argument in this case, we ordered the Government to file under seal the relevant material pertaining to the identification policy so that we could conduct an *in camera, ex parte* review.

Discussion

I. Jurisdiction & Standing

Jurisdiction

The Government argues that the district court lacked jurisdiction to hear any of Gilmore's claims because 49 U.S.C. § 46110 divested the court of jurisdiction. The relevant provisions of § 46110 state:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security . . . or the Administrator of the Federal Aviation Administration . . .) in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.
>
> . . . .
>
> . . . When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.

49 U.S.C. § 46110(a), (c) (2005).[5] Accordingly, whether the district court had jurisdiction over Gilmore's claims turns on whether the Security Directive that established the identification policy is an "order" within the meaning of this statute.[6] On the basis of Gilmore's allegations, the district court assumed that the identification policy was a Security Directive issued by TSA, and then determined that the Security Directive is an "order." To complete the jurisdictional inquiry, we must also determine whether the Security Directive was issued by an appropriate government official and under proper authority pursuant to § 46110(a).

"Courts have given a broad construction to the term 'order' in Section 1486(a) [46110's predecessor]." *Sierra*

---

[5] In 2003, Congress amended § 46110 to authorize the courts of appeals to review orders issued "in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114." 49 U.S.C. § 46110(a); Pub. L. No. 108-176, § 228, 117 Stat. 2490, 2532 (2003). The prior version restricted the scope of review to orders issued only "under this part." As previously mentioned, TSA can issue Security Directives pursuant to § 114(*l*)(2)(A) "without providing notice or an opportunity for comment." 49 U.S.C. § 114(*l*)(2)(A). Therefore, 49 U.S.C. § 46110(a) allows for courts of appeals to review Security Directives absent prior adjudication. *See, Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1125 (W.D. Wash. 2005).

[6] In the district court, the Government "assumed the truth of the content of the identification policy as alleged in Gilmore's complaint" and refused to confirm or deny its existence. In its brief to this court, however, the Government stated that "TSA has now confirmed the existence of an identification requirement – that 'as part of its security rules, TSA requires airlines to ask passengers for identification at check-in.' *Protection of Sensitive Security Information*, 69 Fed. Reg. 28066, 28070-28071 (May 18, 2004)." Moreover, at oral argument, the Government stated that it "accepts as true" that at "the center of this case is a Security Directive." Therefore, we refer to the security measure that imposed the identification policy as a Security Directive, and analyze whether it is an "order" within the meaning of § 46110(a).

Club v. Skinner, 885 F.2d 591, 592 (9th Cir. 1989). This circuit's case law provides some guidance in defining an "order." As we have explained, finality is key:

> "Order" carries a note of finality, and applies to any agency decision which imposes an obligation, denies a right, or fixes some legal relationship. In other words, if the order provides a "definitive" statement of the agency's position, has a "direct and immediate" effect on the day-to-day business of the party asserting wrongdoing, and envisions "immediate compliance with its terms," the order has sufficient finality to warrant the appeal offered by section [46110].

Crist v. Leippe, 138 F.3d 801, 804 (9th Cir. 1998) (quoting *Mace v. Skinner,* 34 F.3d 854, 857 (9th Cir. 1994)).

Finality is usually demonstrated by an administrative record and factual findings. "The existence of a reviewable administrative record is the determinative element in defining an FAA decision as an 'order' for purposes of Section [46110]." *Sierra Club,* 885 F.2d at 593 (citation omitted). An adequate record, however, may consist of "little more" than a letter. *San Diego Air Sports Ctr., Inc. v. FAA,* 887 F.2d 966, 969 (9th Cir. 1989).[7] As noted, we have

---

[7] Prior to submitting the sealed materials for our review, the Government argued that an administrative record is not required for § 46110 to apply. The Government cites to *Nevada Airlines, Inc. v. Bond,* 622 F.2d 1017, 1020 (9th Cir. 1980) as support for this proposition. Unlike this case, *Nevada Airlines* dealt with an FAA emergency revocation order, and therefore was not "the ordinary case." *Id.* at 1020. In justifying the narrow scope of review employed in that case, we noted that "[t]his limited standard of judicial review has been consistently applied in evaluating the propriety of *emergency agency action* under other statutory schemes relating to the public safety and welfare." *Id.* at 1020 n.6. (emphasis added). Because we examined the

(Continued on following page)

reviewed *in camera* the materials submitted by the Government under seal, and we have determined that the TSA Security Directive is final within the meaning of § 46110(a). The Security Directive "imposes an obligation" by requiring airline passengers to present identification or be a "selectee," and by requiring airport security personnel to carry out the policy. The Security Directive also provides a "definitive statement" of TSA's position by detailing the policy and the procedures by which it must be effectuated. Because the Security Directive prevents from air travel those who, like Gilmore, refuse to comply with the identification policy, it has a "direct and immediate" effect on the daily business of the party asserting wrongdoing. Finally, the Security Directive "envisions immediate compliance." Pursuant to TSA regulations, aircraft operators that are required to maintain approved security programs "must comply with each Security Directive issued to the aircraft operator by TSA, within the time prescribed in the Security Directive for compliance." 49 C.F.R. § 1544.305(b) (2005).

Therefore, having reviewed the TSA Security Directive that requires airline operators to enforce the identification policy, we hold that it is an "order" within the meaning of § 46110(a). We also determine that the Security Directive was issued by an appropriate government official and under proper authority as required by

---

available administrative record of the policy at issue, however, this argument is moot.

§ 46110(a).[8] Accordingly, the district court lacked jurisdiction to hear challenges to the identification policy.[9]

Although Gilmore should have brought his claims in the court of appeals in the first instance, "Congress has provided a jurisdiction-saving tool that permits us to transfer the case[ ] to this court and consider the petition[ ] as though [it] had never been filed in the district court." *Castro-Cortez v. INS*, 239 F.3d 1037, 1046 (9th Cir. 2001). In an effort to cure jurisdictional defects, 28 U.S.C. § 1631 allows for the transfer of civil actions among federal courts. Section 1631 authorizes transfers to correct jurisdictional problems "only in cases that are actually transferred or are at least transferable." *Clark v. Busey*, 959 F.2d 808, 812 (9th Cir. 1992). That is, we can transfer a civil case to ourselves if "(1) we would have been able to exercise jurisdiction on the date that [it was] filed in the district court; (2) the district court lacked jurisdiction over

---

[8] We also determine that the Security Directive constitutes SSI pursuant to 49 C.F.R. § 1520.5(b)(2)(i), and therefore it did not have to be disclosed to Gilmore.

[9] Although the Security Directive is an "order" within the meaning of 49 U.S.C. § 46110(a), the district court maintains jurisdiction to hear broad constitutional challenges to Defendants' actions. That is, the district court is divested of jurisdiction only if the claims are "inescapably intertwined with a review of the procedures and merits surrounding the . . . order." *Mace*, 34 F.3d at 858. Gilmore's due process vagueness challenge is "inescapably intertwined" with a review of the order because it squarely attacks the orders issued by the TSA with respect to airport security. Moreover, Gilmore's other claims are as-applied challenges as opposed to broad facial challenges. Given that they arise out of the particular facts of Gilmore's encounter with Southwest Airlines, these claims must be brought before the courts of appeals. *See Tur v. FAA*, 104 F.3d 290, 292 (9th Cir. 1997) (distinguishing between a "facial challenge to agency action" and a "specific individual claim"); *Mace*, 34 F.3d at 859.

the case []; and (3) the transfer is in the interests of justice." *Castro-Cortez,* 239 F.3d at 1046 (citing *Kolek v. Engen,* 869 F.2d 1281, 1284 (9th Cir. 1989)).

All three of these conditions are met in this case. First, § 46110(a) expressly gives this court jurisdiction to hear Gilmore's claims, given that he is a resident of California and he challenges an "order." Second, as explained above, the district court lacked jurisdiction to entertain Gilmore's claims. Finally, a transfer of this case to our court to cure the lack of jurisdiction is in the interest of justice. Gilmore's claims call into question the propriety of the Government's airline passenger identification policy and implicate the rights of millions of travelers who are affected by the policy. In these unique circumstances, it is of the utmost importance that we resolve Gilmore's claims without further delay. In sum, justice would best be served by transferring Gilmore's district court complaint to this court and treating it as a petition for review under § 1631.

Standing

Next, we must address the Government's challenge to Gilmore's standing. Gilmore's claims are not limited to the identification policy. Rather, he challenges a host of practices, which he collectively refers to as "the Scheme." The facts of Gilmore's alleged injury are simple. Gilmore went to Oakland International Airport and San Francisco International Airport to board flights to the east coast. He refused to present identification or undergo a more exacting search, in contravention of the policy, and therefore was not allowed to board his flights. In light of these facts,

Defendants argue that Gilmore has standing only to challenge the identification policy.

Although CAPPS and the No-Fly and Selectee lists are predicated upon the results of the identification policy, i.e. the identity of the passenger, Gilmore's alleged injury stems from the identification policy itself, and does not implicate other security programs that depend upon passenger identification information.

To establish standing, a plaintiff must demonstrate three elements:

> First, plaintiffs must clearly demonstrate that they have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1086 (9th Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992)). Although Gilmore's complaint describes various airport security programs and policies, the only "injury in fact" that Gilmore alleged was his inability to fly, which clearly stemmed from the identification policy. The fact that the identification policy relates to the other security programs does not mean that Gilmore suffered an "injury in fact" due to these additional programs. Standing, as the Supreme Court stated, "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

Gilmore also challenges the alleged identification policies of other modes of travel, specifically the interstate bus and train systems. Gilmore asserts in his brief to us that he has standing to challenge the Government's identification policies as they relate to other forms of interstate travel because his "right to travel by all modes has been chilled on an ongoing basis – not just in two airports on July 4, 2002." Once again, however, Gilmore fails to establish standing. Gilmore's challenge to the alleged identification systems of other modes of travel is based on one sentence in his fifty-five paragraph complaint. He did not allege that he attempted to board a bus or train, but rather he alleged that he "is also informed and believes and hereby alleges that similar requirements have been placed on travelers who use passenger trains by the government defendants, and that similar requirements are being instituted for interstate bus travel." This sole allegation, however, is insufficient to establish standing. In fine, Gilmore lacks standing to challenge all components of "the Scheme" except the identification policy.

We next turn to the merits of each claim, examining only whether the airline identification policy caused the alleged constitutional violations.

II. Due Process

Gilmore alleges that he was penalized for failing to comply with a law that he has never seen. He argues that the Government's failure to provide adequate notice of the law violates his right to due process and renders the law unconstitutionally vague. The district court did not reach the merits of Gilmore's due process claim because it dismissed the claim on jurisdictional grounds.

In support of his vagueness challenge, Gilmore relies principally on *Kolender v. Lawson,* 461 U.S. 352 (1983), in which the Supreme Court held that a California statute was unconstitutionally vague because it did not clarify the requirement that a person who loiters or wanders on the street provide "credible and reliable" identification when requested by a peace officer. Although the statute was struck down because it was unconstitutionally vague, *Kolender* is easily distinguishable from the present case. The statute in *Kolender,* California Penal Code § 647(e), was penal in nature. In applying the void-for-vagueness doctrine to the statute, the Supreme Court stated that this doctrine "requires that a *penal statute* define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender,* 461 U.S. at 357 (emphasis added). Unlike the penal statute in *Kolender,* the identification policy here does not impose any criminal sanctions, or threats of prosecution, on those who do not comply. Rather, it simply prevents them from boarding commercial flights.

Moreover, Gilmore had actual notice of the identification policy. He alleged that several airline personnel asked him for identification and informed him of the identification policy. They told him that in order to board the aircraft, he must either present identification or be subject to a "selectee" search. He also saw a sign in front of United Airlines' ticketing counter that read "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." Although Gilmore was not given the text of the identification policy due to the Security Directive's classification as SSI, he was nonetheless accorded adequate notice

given that he was informed of the policy and how to comply. *See Forbes v. Napolitano,* 236 F.3d 1009, 1011 (9th Cir. 2000) ("[I]ndividuals must be given a reasonable opportunity to discern whether their conduct is proscribed so they can choose whether or not to comply with the law.").

Gilmore also alleges that the Government violated his due process rights because the identification policy vests airline security personnel with unbridled discretion. Upon review of the TSA Security Directive, we hold that the Directive articulates clear standards. It notifies airline security personnel of the identification requirement and gives them detailed instructions on how to implement the policy. Moreover, because all passengers must comply with the identification policy, the policy does not raise concerns of arbitrary application. For all these reasons, we reject Gilmore's due process arguments.

III. Right To Travel

Gilmore alleges that the identification policy violates his constitutional right to travel because he cannot travel by commercial airlines without presenting identification, which is an impermissible federal condition.[10] We reject

[10] Gilmore argues that the identification policy functions as a prior restraint on his ability to travel. Gilmore's argument that we should apply a First Amendment prior restraint analysis is not persuasive. Gilmore cites *Nunez v. City of San Diego,* 114 F.3d 935 (9th Cir. 1997), for the proposition that a First Amendment prior restraint analysis applies to the right to travel context. In *Nunez,* we held that a city juvenile curfew ordinance was unconstitutionally vague and overbroad, violated equal protection, and violated parents' fundamental right to rear their children without undue government interference. The opinion, in addressing a right to travel claim, specifically separated the

(Continued on following page)

Gilmore's right to travel argument because the Constitution does not guarantee the right to travel by any particular form of transportation.

Because Gilmore lacks standing to challenge anything but the identification policy's impact on air travel, his sole argument is that "air travel is a necessity and not replaceable by other forms of transportation." Although we do not question this allegation for purposes of this petition, it does not follow that Defendants violated his right to travel, given that other forms of travel remain possible.

This circuit's decision in *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999), is on point. In *Miller*, the plaintiff challenged California's requirement that applicants submit their social security numbers to the DMV in order to obtain valid drivers licenses. The plaintiff alleged that this policy violated his fundamental right to interstate travel and his right to freely exercise his religion. In affirming the district court's dismissal pursuant to Rule 12(b)(6), we concluded that "by denying Miller a single mode of transportation – in a car driven by himself – the DMV did not unconstitutionally impede Miller's right to interstate travel." *Id.* at 1204. Although we recognized the fundamental right to interstate travel, we also acknowledged that "burdens on a single mode of transportation do not

---

right to travel discussion from a First Amendment overbreadth claim because "courts have articulated different tests to examine burdens on First Amendment rights and on other fundamental rights." *Id.* at 944 n.6. Moreover, we did not once mention prior restraint in our analysis, but instead applied the overbreadth doctrine. We expressly stated that we did not consider the First Amendment overbreadth challenge based on the right to travel because the "Supreme Court has not applied [the] overbreadth [doctrine] outside the limited context of the First Amendment." *Id.* at 949 n.11.

implicate the right to interstate travel." *Id.* at 1205 (citing *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972)).

Like the plaintiff in *Miller,* Gilmore does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him. Moreover, the identification policy's "burden" is not unreasonable. *See Shapiro v. Thompson,* 394 U.S. 618, 629 (1969) (noting the right of all citizens to be "free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement"), *overruled in part on other grounds by Edelman v. Jordan,* 415 U.S. 651, 670-71 (1974). The identification policy requires that airline passengers either present identification or be subjected to a more extensive search. The more extensive search is similar to searches that we have determined were reasonable and "consistent with a full recognition of appellant's constitutional right to travel." *United States v. Davis,* 482 F.2d 893, 912-13 (9th Cir. 1973).

In *Davis,* an airline employee searched the defendant's briefcase as part of the airport's preboarding screening procedure. Although we remanded for further consideration of whether the defendant consented to the search, we held that airport screening searches of potential passengers and their immediate possessions for weapons and explosives is reasonable so long as each potential passenger maintains the right to leave the airport instead of submitting to the search. *Id.* at 912. In so holding, we considered several airport screening procedures, including behavioral profiling, magnetometer screening, identification check, and physical search of the passenger's person and carry-on baggage. *Id.* at 900. We

see little difference between the search measures discussed in *Davis* and those that comprise the "selectee" search option of the passenger identification policy at hand. Additionally, Gilmore was free to decline both options and use a different mode of transportation. In sum, by requiring Gilmore to comply with the identification policy, Defendants did not violate his right to travel.

IV. Fourth Amendment

Gilmore next alleges that both options under the identification policy – presenting identification or undergoing a more intrusive search – are subject to Fourth Amendment limitations and violated his right to be free from unreasonable searches and seizures.

Request For Identification

Gilmore argues that the request for identification implicates the Fourth Amendment because "the government imposes a severe penalty on citizens who do not comply." Gilmore highlights the fact that he was once arrested at an airport for refusing to show identification and argues that the request for identification "[i]mposes the severe penalty of arrest." Gilmore further argues that the request for identification violates the Fourth Amendment because it constitutes "a warrantless general search for identification" that is unrelated to the goals of detecting weapons or explosives.

The request for identification, however, does not implicate the Fourth Amendment. "[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *INS v. Delgado,* 466 U.S. 210, 216 (1984). Rather, "[a]n individual is seized within the meaning

of the fourth amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. $25,000 U.S. Currency,* 853 F.2d 1501, 1504 (9th Cir. 1988) (internal quotation marks omitted). In *Delgado,* the Supreme Court held that INS agents' questioning of factory workers about their citizenship status did not constitute a Fourth Amendment seizure. In *$25,000 U.S. Currency,* we held that a DEA agent's request for identification from a person waiting to board a flight was not a Fourth Amendment seizure.

Similarly, an airline personnel's request for Gilmore's identification was not a seizure within the meaning of the Fourth Amendment. Gilmore's experiences at the Oakland and San Francisco airports provide the best rebuttal to his argument that the requests for identification imposed a risk of arrest and were therefore seizures. Gilmore twice tried to board a plane without presenting identification, and twice left the airport when he was unsuccessful. He was not threatened with arrest or some other form of punishment; rather he simply was told that unless he complied with the policy, he would not be permitted to board the plane. There was no penalty for noncompliance.

Request To Search

Gilmore argues that the selectee option is also unconstitutional because the degree of intrusion is unreasonable. We reject this argument because it is foreclosed by our decisions in *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973) and *Torbet v. United Airlines, Inc.,* 298 F.3d 1087 (9th Cir. 2002). The identification policy's search option implicates the Fourth Amendment. *See Davis,* 482

F.2d at 895 (holding that the government's participation in airport search programs brings any search conducted pursuant to those programs within the reach of the Fourth Amendment). Airport screening searches, however, do not per se violate a traveler's Fourth Amendment rights, and therefore must be analyzed for reasonableness. *Id.* at 910. As we explained in *Davis*:

> To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.

Id. at 910-11 (footnotes omitted). Gilmore was free to reject either option under the identification policy, and leave the airport. In fact, Gilmore did just that. United Airlines presented him with the "selectee" option, which included walking through a magnetometer screening device, being subjected to a handheld magnetometer scan, having a light body patdown, removing his shoes, and having his bags hand searched and put through a CAT-scan machine. Gilmore declined and instead left the airport.

Additionally, the search option "is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives . . . [and] is confined in good faith to [prevent the carrying of weapons or explosives aboard aircrafts]; and . . . passengers may avoid the search by electing not to fly."[11] *Torbet,* 298 F.3d at 1089

[11] We recently held in *United States v. Marquez,* 410 F.3d 612, 616 (9th Cir. 2005), that a handheld magnetometer wand scan is no more intrusive and extensive than necessary.

(describing the requirements for reasonableness as laid out in *Davis*) (citations omitted). Therefore, the search option was reasonable and did not violate Gilmore's Fourth Amendment rights.

Gilmore also suggests that the identification policy did not present a meaningful choice, but rather a "Hobson's Choice," in violation of the unconstitutional conditions doctrine. We have held, as a matter of constitutional law, that an airline passenger has a choice regarding searches:

> [H]e may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave. If he chooses to proceed, that choice, whether viewed as a relinquishment of an option to leave or an election to submit to the search, is essentially a "consent," granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment.

Davis, 482 F.2d at 913. Gilmore had a meaningful choice. He could have presented identification, submitted to a search, or left the airport. That he chose the latter does not detract from the fact that he could have boarded the airplane had he chosen one of the other two options. Thus, we reject Gilmore's Fourth Amendment arguments.

V. Right To Associate and Right To Petition the Government

Finally, Gilmore argues that because the identification policy violates his right to travel, it follows that it also violates his right to petition the government and freely associate. These claims, as Gilmore argued in his appellate brief, are based on the notion that "[f]reedom to physically

travel and the free exercise of First Amendment rights are inextricably intertwined." Here, this logic works to Gilmore's detriment. That is, even accepting Gilmore's assertion that there is a connection between the right to travel and First Amendment freedoms, his argument fails because, as we explained, his right to travel was not unreasonably impaired.

Gilmore argues that the identification requirement impinges his First Amendment right to associate anonymously. In support of this argument he relies principally on *Thomas v. Collins,* 323 U.S. 516, 539 (1945), in which the Supreme Court concluded that a registration requirement for public speeches is "generally incompatible with an exercise of the rights of free speech and free assembly." *Thomas,* however, is easily distinguishable from the present case. Unlike the regulation in *Thomas,* the identification policy is not a direct restriction on public association; rather it is an airline security measure.

Further, Gilmore did not allege that he was exercising his right to freely associate in the airport, but rather that he was attempting to fly to Washington, D.C. so that he could exercise his right to associate there. The enforcement of the identification policy did not prevent him from associating anonymously in Washington, D.C. because he could have abided by the policy, or taken a different mode of transport. Although the policy did inconvenience Gilmore, this inconvenience did not rise to the level of a constitutional violation. In the end, Gilmore's free association claim fails because there was no direct and substantial action impairing this right.

Gilmore's right to petition claim similarly fails. Although Gilmore did not fly to Washington, D.C., where he

planned to petition the government for redress of grievances, the identification policy did not prevent him from doing so. The identification policy is not a direct regulation of any First Amendment expressive activity, nor does it impermissibly inhibit such activity. Gilmore's claims that Defendants violated his rights to associate anonymously and petition the government are without merit.

Conclusion

In sum, we conclude that Defendants did not violate Gilmore's constitutional rights by adopting and implementing the airline identification policy. Therefore, his claims fail on the merits and we deny his petition for review.

TRANSFERRED, PETITION DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN GILMORE,

Plaintiff,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; NORMAN MINETA, in his official capacity as Secretary of Transportation; MARION C. BLAKEY, as Administrator of the Federal Aviation Administration; Admiral JAMES M. LOY, in his official capacity as Acting Undersecretary of Transportation for Security; TOM RIDGE, in his official capacity as Chief of the Office of Homeland Security; UAL CORPORATION, aka UNITED AIRLINES; and DOES I-XXX,

Defendants.

/

No. C 02-3444 SI

ORDER GRANTING MOTIONS TO DISMISS AND DENYING REQUEST FOR JUDICIAL NOTICE

(Filed Mar. 23, 2004)

Defendants have moved to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS the

motions to dismiss[1] and DENIES plaintiff's request for judicial notice.

BACKGROUND

Plaintiff John Gilmore is a California resident who is suing the United States[2] and Southwest Airlines for refusing to allow him to board an airplane on July 4, 2002 without either displaying a government-issued identification consenting to a search. Plaintiff alleges that these security requirements imposed by the United States government and effected by the airline companies violate several of his constitutional rights, including his rights under the First and Fourth Amendments.[3]

---

[1] After the initiation of this action, defendant United Air Lines, Inc. filed for Chapter 11 bankruptcy protection. Thus the claims against it are subject to the automatic stay imposed pursuant to 11 U.S.C. § 362(a). On January 17, 2003, in open court, plaintiff and the remaining defendants agreed to sever the claims against defendant United Air Lines, Inc. from the balance of the complaint. In light of the disposition of the balance of the claims in this case, the severed claims against United will be dismissed without prejudice.

[2] The federal defendants are John Ashcroft, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation; Norman Mineta, in his official capacity as Secretary of Transportation; Marion C. Blakey, as Administrator of the Federal Aviation Administration, substituted for Jane F. Garvey under Rule 25(d)(1); Admiral James M. Loy, in his official capacity as Acting Undersecretary of Transportation for Security, substituted for John W. Magaw under Rule 25(d)(10; and Tom Ridge, in his official capacity as Chief of the Office of Homeland Security

[3] Plaintiff's complaint also alleged equal protection and Freedom of Information Act (FOIA) claims, but plaintiff's lawyer stated in oral argument that plaintiff withdraws these claims. Accordingly, the equal protection and FOIA claim are no longer before this Court.

On July 4, 2002 plaintiff went to the Oakland International Airport and attempted to fly to the Baltimore Washington International Airport to "petition the government for redress of grievances and to associate with others for that purpose." Complaint at 2:2-4. Plaintiff approached the Southwest ticket counter with a ticket that he had previously purchased and was asked to provide identification. Complaint at ¶25. Plaintiff refused and inquired whether there was any way for him to board the plane without showing identification. He was told by the ticket clerk that he could be screened instead. *Id.* Plaintiff also asked the clerk if she knew the origin of this requirement. The clerk expressed uncertainty but speculated that the Federal Aviation Administration ("FAA") might have promulgated the identification rule. *Id.* Plaintiff was told to show identification again when he went to the gate to board the plane. Complaint at ¶ 26. He refused and was not allowed to board the plane. *Id.* Plaintiff spoke with a supervisor who explained that airline policy prohibited allowing plaintiff to board. Complaint at ¶ 27.

LEGAL STANDARD

The Court may dismiss a complaint when it is not based on a cognizable legal theory or pleads insufficient facts to support a cognizable legal claim. *Smilecare Dental Group v. Delta Dental Plan,* 88 F.3d 780, 783 (9th Cir. 1996).

DISCUSSION

Plaintiff's complaint alleges that as a result of the requirement that passengers traveling on planes show identification and his unwillingness to comply with this

requirement, he has been unable to travel by air since September 11, 2001. Plaintiff's complaint asserts causes of action challenging the apparent government policy that requires travelers either to show identification or to consent to a search which involves wanding, walking through a magnetometer or a light pat-down. Whether this is actually the government's policy is unclear, as the policy, if it exists, is unpublished. However, this Court for the purpose of evaluating plaintiff's complaint, assumes such a policy does exist, and reviews plaintiff's complaint accordingly.

Plaintiff asserts the unconstitutionality of this policy on the following grounds: vagueness in violation of the Due Process Clause; violation of the right to be free from unreasonable searches and seizures; violation of the right to freedom of association; and violation of the right to petition the government for redress of grievances.

The federal defendants and airline defendant both brought motions to dismiss. As plaintiffs' claims are common to both sets of defendants, this Court treats them collectively. While there are questions about the private defendant's liability as a state actor and about the federal defendants' liability for the private defendant's actions, as this Court has not found plaintiff's complaint to have alleged a constitutional violation, those issues need not be addressed at this time.

1. Standing

As a preliminary matter, the federal defendants have objected to all of plaintiff's claims other than plaintiff's challenges to the identification requirement. It is unclear from plaintiff's complaint whether he intended to plead

any other claims, but he did allude to the "government's plan to create huge, integrated databases by mingling criminal histories with credit records, previous travel history and much more, in order to create dossiers on every traveling citizen," including creation of "no fly" watchlists. Complaint, ¶ 8. He pointed to newspaper and magazine articles and internet websites describing various activities and directives issued by various federal agencies, including the increased use of the Consumer Assisted Passenger Prescreening System ("CAPPS") in the wake of the terrorist attacks on September 11, 2001. Complaint, ¶¶ 35-50.

The federal defendants argue that "as a threshold matter, plaintiff has standing in this action solely insofar as he challenges an alleged federally-imposed requirement that airlines request identification as part of the screening process at airports. The complaint is devoid of any allegation that plaintiff personally has suffered any injury that is fairly traceable to any other practice, procedure, or criterion that may be used by any defendant in screening airline passengers for weapons and explosives." Motion to Dismiss at 2:21-25.

The only injury alleged by plaintiff was his inability to board a plane as a result of the identification requirement. Article III requires that to have standing a plaintiff must show that (1) he was injured (2) that the injury is directly related to the violation alleged and (3) that the injury would be redressable if plaintiff prevailed in the lawsuit. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Plaintiff objects to defendants' "no fly" list, to other "watchlists" and to the CAPPS program, but fails to allege

that his name was on any of these lists or that he personally suffered any injury or inconvenience as a result. The federal defendants are correct that plaintiff has not pled injury sufficient to establish Article III standing concerning these other lists and activities.

In the course of his complaint, plaintiff describes certain orders and directives issued by the FAA and the Transportation Security Administration ("TSA"). The Courts of Appeals have exclusive jurisdiction to review orders issued by the FAA and the TSA. Under 49 U.S.C. § 46110(a):

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . under this part may apply for review of the order by filing a petition for review in the United States Courts of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

Jurisdiction to review such orders is vested in the Courts of Appeals, not the district courts.

Accordingly, to the extent that plaintiff pleads causes of action beyond those stemming from the identification requirement, those causes of action are DISMISSED for lack of standing or jurisdiction.

2. Plaintiff's First Cause of Action: violation of the Due Process Clause

Plaintiff alleges that the identification requirement is "unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment because it is vague, being unpublished, and thus provides no way for ordinary people

or reviewing courts to conclusively determine what is legal." Complaint, ¶ 52. This claim directly attacks the policy, regulation, order or directive requiring production of identification at airports.

In this case, the federal defendants refuse to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it says. They contend, however, that to the extent this action challenges an order issued by the TSA or the FAA, 49 U.S.C. § 46110(a) vests exclusive jurisdiction in the Courts of Appeals to decide the challenge.

The federal defendants also argue that there is no requirement that they issue orders, regulations or policy directives explaining all aspects of the airport security screening process, so that their failure to do so should not result in a finding that policies and procedures are "void for vagueness." Under 49 U.S.C. § 44901(a), the Under Secretary of Transportation for Security is required to "provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft," and under 49 U.S.C. § 44902(a), the Under Secretary must prescribe regulations requiring an air carrier to "refuse to transport – [] a passenger who does not consent to a search . . . establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive or other destructive substance." Defendants argue that the government's interest in ensuring the effectiveness of the screening process is a sufficient justification for its failure to provide these regulations to the public.

Because this claim squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security, this Court does not have jurisdiction to

hear the challenge. As a corollary, without having been provided a copy of this unpublished statute or regulation, if it exists, the Court is unable to conduct any meaningful inquiry as to the merits of plaintiff's vagueness argument. This argument would better be addressed to the Ninth Circuit Court of Appeals or to the Court of Appeals for the District of Columbia Circuit, both of which have jurisdiction to review these matters.

3. Plaintiff's Second Cause of Action: violation of the Fourth Amendment right to be free from unreasonable searches and seizures

A. Request for Identification

Plaintiff alleges that any requirement that he either display government-issued identification or submit to search prior to boarding a plane violates the Fourth Amendment. Complaint at ¶¶ 56-59.

The request for identification, where plaintiff is free to refuse, is not a search and so does not implicate the Fourth Amendment. *See U.S. v. Cirimele,* 845 F.2d 857, 860 (9th Cir. 1988) (D.E.A. agent's request for identification from person in airport was not a seizure within the meaning of the Fourth Amendment). In another context the Supreme Court has held that "[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure," explaining:

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to

> answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984). Similarly, in *U.S. v. Black,* 675 F.2d 129, 136 (7th Cir. 1982), the court held that the request that a person in an airport produce his driver's license and airline ticket was not a seizure, and that a seizure occurred only after the officers took and kept the airline ticket and driver's license. The court stated, "Under our reasoning it is clear that the mere request for and voluntary production of such documents does not constitute a seizure, but rather falls into the category of a non-coercive police-citizen encounter." *Id.*

Plaintiff has cited several cases supporting the proposition that requiring identification, under threat of arrest or some other significant penalty for failure to produce identification, may violate the Fourth Amendment. Those cases do not suggest that what happened to Mr. Gilmore, the request that he provide identification alone, violates the Fourth Amendment. For example, in *Lawson v. Kolender,* 658 F.2d 1362, 1367-68 (9th Cir. 1981) (aff'd on other grounds, 461 U.S. 352 (1983)), the court stated that a statute criminalizing the refusal to provide identification violated the Fourth Amendment. Notably, the Court based its decision in part on the fact that criminalizing the refusal to provide identification provides a basis for arrest. *Id.* at 1367. Where individuals are or can be arrested for failing to identify themselves, seizure, and hence the Fourth Amendment, are clearly implicated. Thus, in *Martinelli v. Beaumont,* 820 F.2d 1491 (9th Cir. 1987), the plaintiff was arrested for failure to identify herself, and

the court held that arresting a person for failure to identify herself violated the Fourth Amendment. Similarly in *Carey v. Nevada Gaming Board,* 279 F.3d 873, 880 (9th Cir. 2000), the Court found a Fourth Amendment violation in a statute which made it a misdemeanor for individuals detained on reasonable suspicion of having committed a crime to refuse to identify themselves.

In plaintiffs' case, he was not required to provide identification on pain of criminal or other governmental sanction. Identification requests unaccompanied by detention, arrest, or any other penalty, other than the significant inconvenience of being unable to fly, do not amount to a seizure within the meaning of the Fourth Amendment. Plaintiff has not suggested that he felt that he was not free to leave when he was asked to produce identification. None of the facts submitted by plaintiff suggests that the request for identification implicated plaintiff's Fourth Amendment rights. Therefore, plaintiff's claim that the identification requirement is unreasonable does not raise a legal dispute that this Court must decide.

Defendants, while contending that the request for identification was neither a search nor a seizure, did nevertheless argue at some length that the request for identification is a reasonable means of effectuating the purpose of airline safety and meeting the requirements of 49 U.S.C. § 114(h)(2)-(3). That statute requires the TSA to establish procedures for informing airlines of the identity of "individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline of passenger safety" (49 U.S.C. § 114(h)(2)), and to establish policies that enable air carriers to identify people "on passenger lists who may be a threat" (49 U.S.C. § 114(h)(3)(A)) and prevent them from boarding an aircraft (49 U.S.C.

§ 114(h)(3)(B)). Defendants argue that verifying passengers' identity is a reasonable means of effectuating the purpose of the statute.

It appears to this Court that the requirement that identification be provided before boarding an airplane is a minimal intrusion on personal privacy and is a reasonable, if modest, step toward ensuring airline safety. It may be, as plaintiff argues, that easy access to false identification documents will reduce the effectiveness of the effort, but the effort itself seems a reasonable one. However, in light of this Court's finding that no search or seizure occurred, no finding concerning the reasonableness of the identification requirement is required.

B. Request to consent to search

Under this circuit's jurisprudence, Southwest's request that the plaintiff submit to search may have constituted a seizure subject to Fourth Amendment scrutiny. When the government is significantly involved in a plan to search, state action, and thus the Fourth Amendment, may be implicated. The Ninth Circuit has held that an airport search is a "functional, not merely a physical process . . . [that] begins with the planning of the invasion and continues until effective appropriation of the fruits of the search for subsequent proof of an offense." *U.S. v. Davis,* 482 F.2d 893, 896 (9th Cir. 1973). Under these stringent guidelines, the request that plaintiff consent to search may have been tantamount to a search for purposes of Fourth Amendment analysis, even though the only part of the search that occurred was the planning.

However, if a search did occur, the search was reasonable. An airport screening search is reasonable if: "(1) it is

not more extensive or intensive than necessary . . . ; (2) it is confined in good faith to [looking for weapons and explosives]; and (3) passengers my avoid the search by electing not to fly." *Torbet v. United Airlines,* 298 F.3d 1087, 1089 (9th Cir. 2002); *see United States v. Davis,* 482 F.2d at 895 (9th Cir. 1973) ("We hold further that while 'airport screening searches' per se do not violate a traveler's rights under the Fourth Amendment, or under his constitutionally protected right to travel, such searches must satisfy certain conditions, among which is the necessity of first obtaining the 'consent' of the person to be searched."). In *Torbet* the Court held that the placement of luggage on an x-ray conveyor belt was an implied consent to a luggage search. 298 F.3d at 1089. At all times plaintiff was free to leave the airport rather than submit to search. Further, searches of prospective passengers are reasonable and a necessary [sic] as a means for detecting weapons and explosives. *Torbet v. United Airlines. Inc.,* 298 F.3d at 1089-90. Accordingly, the request that plaintiff consent to search was reasonable and not in violation of the Fourth Amendment.

3. Plaintiff's Third and Fourth Causes of Action: violation of the right to travel protected by the Due Process Clause

Plaintiff alleges that the right to "travel at home without unreasonable government restriction is a fundamental constitutional right of every American citizen and is subject to strict scrutiny." ¶ 61. Defendant Southwest Airlines notes that the right to travel has not been found by the courts to be contained within the constitutional amendments cited by plaintiff. Southwest advocates dismissal on these grounds. Defs' Motion to Dismiss at 2,

n.1. The Court declines to dismiss on these grounds as the notice pleading standard requires this Court to liberally construe plaintiff's complaint. The right to travel, while sometimes elusive, is clearly grounded in the Constitution. The Supreme Court has located it at times in the Privileges and Immunities Clause of Article IV, the Commerce Clause, the Privileges and Immunities Clause of the Fourteenth Amendment and the "federal structure of government adopted by our Constitution." *Att'y Gen. of New York v. Soto-Lopez,* 476 U.S. 898, 902 (1986).

However, plaintiff's allegation that his right to travel has been violated is insufficient as a matter of law because the Constitution does not guarantee the right to travel by any particular form of transportation. *Miller v. Reed,* 176 F.3d 1202, 1205 (9th Cir. 1999) ("[B]urdens on a single mode of transportation do not implicate the right to interstate travel."); *Monarch Travel Serv. Assoc. Cultural Clubs, Inc.,* 466 F.2d 552 (9th Cir. 1972). The right to travel throughout the United States confers a right to be "uninhibited by statutes, rules and regulations which unreasonably burden or restrict this movement." *Saenz v. Roe,* 526 U.S. 486, 499 (9th Cir. 1973). This Court rejects plaintiff's argument that the request that plaintiff either submit to search, present identification, or presumably use another mode of transport, is a violation of plaintiff's constitutional right to travel.

4. Plaintiff's Fourth Cause of Action: violation of the right to freedom of association protected by the First and Fifth Amendments

Plaintiff's allegation that his right to associate freely was violated fails because the only actions which violate this right are those which are "direct and substantial or

significant." *Storm v. Town of Woodstock,* 944 F. Supp. 139, 144 (N.D.N.Y. 1996). Government action which only indirectly affects associational rights is not sufficient to state a claim for violation of the freedom to associate. To the extent that plaintiff alleged plans to exercise his associational rights in Washington, D.C., the Court finds that plaintiff's rights were not violated as plaintiff had numerous other methods of reaching Washington.

5. Plaintiff's Fifth Cause of Action: violation of the right to petition the government for redress of grievances protected by the First Amendment

Plaintiff alleges that "[t]he right to petition the government for redress of grievances is a fundamental Constitutional right, subject to strict scrutiny" and that this right is "burdened by requiring Petitioners to identify themselves, and by preventing Petitioners from traveling to where the seat of government is located." Complaint at ¶ 69. The right to petition the government for redress of grievances has been "held to be enforceable against the states by virtue of the Fourteenth Amendment." *See Hilton v. City of Wheeling,* 209 F.3d 1005, 1006-07 (7th Cir. 2000). But the right to petition the government for redress of grievances is only implicated by governmental action that prevents the exercise of such a right. *Id.* Although the government's refusal to let Mr. Gilmore board an airplane on Mr. Gilmore's terms may have made it more difficult for him to petition the government for redress, he certainly was not altogether prevented from doing so. Therefore, Mr. Gilmore's argument that his constitutional right to petition the government for redress was violated is rejected.

6. Plaintiff's request for judicial notice

Plaintiff filed a request for judicial notice of The Privacy Commissioner of Canada's "Annual Report to Parliament." The Court may take judicial notice of adjudicative facts (Fed. R. Evid. 201(a) and (b)), and under certain circumstances must take judicial notice of those adjudicative facts which are reasonably beyond dispute (Fed. R. Evid. 201(d)). "Adjudicative facts" are "the facts of the particular case." The opinions of the Canadian government regarding privacy issues are not relevant to the adjudication of this dispute. Therefore, the report is not an adjudicative fact, as it is beyond the scope of this case. Further, the Court did not rely on this report in evaluating defendants' motions to dismiss. For the foregoing reasons, the Court declines to take judicial notice of this report.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed. Plaintiff's claims against the federal defendants and Southwest Airlines are dismissed with prejudice; plaintiff's claims against United Airlines are dismissed without prejudice. Plaintiff's request for judicial notice is denied. [Docket ## 6, 8, 10, 22, 28].

IT IS SO ORDERED.

Dated: March 19, 2004

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE, Plaintiff-Appellant, v. ALBERTO R. GONZALES, Attorney General, in his official capacity as Attorney General of the United States; et al., Defendants-Appellees.	No. 04-15736 D.C. No. CV-02-03444-SI Northern District of California, San Francisco ORDER (Filed Apr. 5, 2006)

Before: TROTT, T.G. NELSON, and PAEZ, Circuit Judges.

Appellant's petition for panel rehearing is DENIED.

The full court has been advised of Appellant's petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b). Therefore the petition for rehearing en banc is DENIED.

49 U.S.C. § 114(s). **Transportation Security Administration.**

(s) Nondisclosure of security activities. –

(1) In general. – Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would –

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

(2) Availability of information to Congress. – Paragraph (1) does not authorize information to be withheld from a committee of Congress authorized to have the information.

(3) Limitation on transferability of duties. – Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this subsection to another department, agency, or instrumentality of the United States.

---

49 U.S.C. § 40119. **Security and research and development activities.**

(a) General requirements. – The Under Secretary of Transportation for Security and the Administrator of the Federal Aviation Administration each shall conduct research (including behavioral research) and development activities appropriate to develop, modify, test, and evaluate a system, procedure, facility, or device to protect passengers and property against acts of criminal violence, aircraft piracy, and terrorism and to ensure security.

(b) Disclosure. – (1) Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would –

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to transportation safety.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

(c) Transfers of duties and powers prohibited. – Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this section to another department, agency, or instrumentality of the United States Government.

***49 U.S.C. § 44902.* Refusal to transport passengers and property.**

(a) Mandatory refusal. – The Under Secretary of Transportation for Security shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport –

(1) a passenger who does not consent to a search under section 44901(a) of this title establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance; or

(2) property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.

(b) Permissive refusal. – Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

(c) Agreeing to consent to search. – An agreement to carry passengers or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier is deemed to include an agreement that the passenger or property will not be carried if consent to search the passenger or property for a purpose referred to in this section is not given.

---

49 C.F.R. § 1520.5. Sensitive security information.

(a) *In general.* In accordance with 49 U.S.C. 114(s), SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would –

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

(b) *Information constituting SSI.* Except as otherwise provided in writing by TSA in the interest of public safety or in furtherance of transportation security, the following information, and records containing such information, constitute SSI:

(1) *Security programs and contingency plans.* Any security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including –

(i) Any aircraft operator, airport operator, or fixed base operator security program, or security contingency plan under this chapter;

(ii) Any vessel, maritime facility, or port area security plan required or directed under Federal law;

(iii) Any national or area security plan prepared under 46 U.S.C. 70103; and

(iv) Any security incident response plan established under 46 U.S.C. 70104.

(2) *Security Directives.* Any Security Directive or order –

(i) Issued by TSA under 49 CFR 1542.303, 1544.305, or other authority;

(ii) Issued by the Coast Guard under the Maritime Transportation Security Act, 33 CFR part 6, or 33 U.S.C. 1221 *et seq.* related to maritime security; or

(iii) Any comments, instructions, and implementing guidance pertaining thereto.

(3) *Information Circulars.* Any notice issued by DHS or DOT regarding a threat to aviation or maritime transportation, including any –

(i) Information Circular issued by TSA under 49 CFR 1542.303, 1544.305, or other authority; and

(ii) Navigation or Vessel Inspection Circular issued by the Coast Guard related to maritime security.

(4) *Performance specifications.* Any performance specification and any description of a test object or test procedure, for –

(i) Any device used by the Federal government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any weapon, explosive, incendiary, or destructive device or substance; and

(ii) Any communications equipment used by the Federal government or any other person in carrying out or complying with any aviation or maritime transportation security requirements of Federal law.

(5) *Vulnerability assessments.* Any vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program.

(6) *Security inspection or investigative information.* (i) Details of any security inspection or investigation of an alleged violation of aviation or maritime transportation security requirements of Federal law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

(ii) In the case of inspections or investigations performed by TSA, this includes the following information as to events that occurred within 12 months of the date of release of the information: the name of the airport where a violation occurred, the airport identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of any aircraft operator in connection with specific locations or specific security procedures. Such information will be released after the relevant 12-month period, except that TSA will not release the specific gate or other location on an airport where an event occurred, regardless of the amount of time that has passed since its occurrence. During the period within 12 months of the date of release of the information, TSA may release summaries of an aircraft operator's, but not an airport operator's, total security violations in a specified time range without identifying specific violations or locations. Summaries may include total enforcement actions, total proposed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(7) *Threat information.* Any information held by the Federal government concerning threats against transportation or transportation systems and sources and methods used to gather or develop threat information, including threats against cyber infrastructure.

(8) *Security measures.* Specific details of aviation or maritime transportation security measures, both operational and technical, whether applied directly by the Federal government or another person, including –

(i) Security measures or protocols recommended by the Federal government;

(ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information; and

(iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator.

(iv) Any armed security officer procedures issued by TSA under 49 CFR part 1562.

(9) *Security screening information.* The following information regarding security screening under aviation or maritime transportation security requirements of Federal law:

(i) Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo,

that is conducted by the Federal government or any other authorized person.

(ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system.

(iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI.

(iv) Any security screener test and scores of such tests.

(v) Performance or testing data from security equipment or screening systems.

(vi) Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.

(10) *Security training materials.* Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out any aviation or maritime transportation security measures required or recommended by DHS or DOT.

(11) *Identifying information of certain transportation security personnel.* (i) Lists of the names or other identifying information that identify persons as –

(A) Having unescorted access to a secure area of an airport or a secure or restricted area of a maritime facility, port area, or vessel or;

(B) Holding a position as a security screener employed by or under contract with the Federal government

pursuant to aviation or maritime transportation security requirements of Federal law, where such lists are aggregated by airport;

(C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection;

(D) Holding a position as a Federal Air Marshal; or

(ii) The name or other identifying information that identifies a person as a current, former, or applicant for Federal Flight Deck Officer.

(12) *Critical aviation or maritime infrastructure asset information.* Any list identifying systems or assets, whether physical or virtual, so vital to the aviation or maritime transportation system that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is –

(i) Prepared by DHS or DOT; or

(ii) Prepared by a State or local government agency and submitted by the agency to DHS or DOT.

(13) *Systems security information.* Any information involving the security of operational or administrative data systems operated by the Federal government that have been identified by the DOT or DHS as critical to aviation or maritime transportation safety or security, including automated information security procedures and systems, security inspections, and vulnerability information concerning those systems.

(14) *Confidential business information.*

(i) Solicited or unsolicited proposals received by DHS or DOT, and negotiations arising therefrom, to perform work pursuant to a grant, contract, cooperative agreement, or other transaction, but only to the extent that the subject matter of the proposal relates to aviation or maritime transportation security measures;

(ii) Trade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities; and

(iii) Commercial or financial information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities, but only if the source of the information does not customarily disclose it to the public.

(15) *Research and development.* Information obtained or developed in the conduct of research related to aviation or maritime transportation security activities, where such research is approved, accepted, funded, recommended, or directed by the DHS or DOT, including research results.

(16) *Other information.* Any information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119. Upon the request of another Federal agency, TSA or the Secretary of DOT may designate as SSI information not otherwise described in this section.

(c) *Loss of SSI designation.* TSA or the Coast Guard may determine in writing that information or records

described in paragraph (b) of this section do not constitute SSI because they no longer meet the criteria set forth in paragraph (a) of this section.

---

49 C.F.R. § 1542.303. Security Directives and Information Circulars.

(a) TSA may issue an Information Circular to notify airport operators of security concerns. When TSA determines that additional security measures are necessary to respond to a threat assessment or to a specific threat against civil aviation, TSA issues a Security Directive setting forth mandatory measures.

(b) Each airport operator must comply with each Security Directive issued to the airport operator within the time prescribed in the Security Directive.

(c) Each airport operator that receives a Security Directive must –

(1) Within the time prescribed in the Security Directive, verbally acknowledge receipt of the Security Directive to TSA.

(2) Within the time prescribed in the Security Directive, specify the method by which the measures in the Security Directive have been implemented (or will be implemented, if the Security Directive is not yet effective).

(d) In the event that the airport operator is unable to implement the measures in the Security Directive, the airport operator must submit proposed alternative measures and the basis for submitting the alternative measures to TSA for approval. The airport operator must submit the proposed alternative measures within the time prescribed

in the Security Directive. The airport operator must implement any alternative measures approved by TSA.

(e) Each airport operator that receives a Security Directive may comment on the Security Directive by submitting data, views, or arguments in writing to TSA. TSA may amend the Security Directive based on comments received. Submission of a comment does not delay the effective date of the Security Directive.

(f) Each airport operator that receives a Security Directive or an Information Circular and each person who receives information from a Security Directive or an Information Circular must:

(1) Restrict the availability of the Security Directive or Information Circular, and information contained in either document, to those persons with an operational need-to-know.

(2) Refuse to release the Security Directive or Information Circular, and information contained in either document, to persons other than those who have an operational need to know without the prior written consent of TSA.

(4)

No. 06-211

In the Supreme Court of the United States

JOHN GILMORE, PETITIONER

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioner alleges that respondents have promulgated "security directives" relating to airline safety that require airline passengers to present identification before boarding or, in the alternative, submit to a more extensive search than would otherwise be required.

The question presented is whether, under the Due Process Clause, petitioner received sufficient notice of the above requirement where petitioner had actual notice of that requirement through oral instructions.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Caplan v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978) 15
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985) 12
Goss v. *Lopez*, 419 U.S. 565 (1975) 12
Hardy v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980) 15
Hawkes v. *IRS*, 467 F.2d 787 (6th Cir. 1972) 15
Kolender v. *Lawson*, 461 U.S. 352 (1983) 14
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 12
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 17

Constitution, statutes and regulations:

U.S. Const:
Amend. I 6, 11
Amend. IV 6, 8, 9, 11
Amend. V (Due Process Clause) 13, 15
Amend. XIV (Equal Protection Clause) 7

Statutes and regulations—Continued: Page

Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. 1355:
§ 525(a)(i), 120 Stat. 1381 19
§ 525(d), 120 Stat. 1382 19
Federal Register Act, 44 U.S.C. 1505 13
44 U.S.C. 1505(a) 13
Freedom of Information Act, 5 U.S.C. 552 (2000 & Sup. IV 2004) 4, 7, 13, 14, 16
Homeland Security Act of 2002, Pub. L. No. 107-296, § 403(2), 116 Stat. 2178 (6 U.S.C. 203(2) (Supp. IV 2004)) 3
11 U.S.C. 362(a) 6
28 U.S.C. 1631 8
49 U.S.C. 114(a) (Supp. III 2003) 2
49 U.S.C. 114(b)(1) (Supp. III 2003) 2
49 U.S.C. 114(d) (Supp. III 2003) 2
49 U.S.C. 114(h)(1)-(3) (Supp. III 2003) 3
49 U.S.C. 114(s) (Supp. III 2003) 15
49 U.S.C. 114(s)(1) (Supp. III 2003) 13
49 U.S.C. 114(s)(1)(c) (Supp. III 2003) 4, 17
49 U.S.C. 40119(b)(1)(C) (Supp. III 2003) 4
49 U.S.C. 44901(a) (Supp. III 2003) 2
49 U.S.C. 44902(a) (2000 & Supp. III 2003) 2
49 U.S.C. 44902(b) (Supp. III 2003) 2
49 U.S.C. 44903(b) (2000 & Supp. III 2003) 3
49 U.S.C. 44904(c) (Supp. III 2003) 3
49 U.S.C. 46110(a) (Supp. III 2003) 7
49 U.S.C. 46318 ..... 2, 14

Regulations—Continued: Page

49 U.S.C. 46502(a) 2
49 U.S.C. 46502(a)(2) 13
49 U.S.C. 46505(b) 2, 14
49 C.F.R.:
Section 1500.3 3
Section 1520.3 4
Section 1520.5(b) 4, 17
Section 1520.5(b)(1)(i) 5
Section 1520.5(b)(2)(i) 5
Section 1520.7 4
Section 1520.9(a)(2) 4
Section 1520.11 4
Section 1540.107 2
Section 1544.103(b)(4) 5
Section 1544.305(a) 3
Section 1544.305(b) 3

Miscellaneous:

69 Fed. Reg. 28,070-28,071 (2004) 10
7 Oxford English Dictionary (2d ed. 1989) 17
Transp. Safety Admin., *Our Travelers: The Screening Experience* (visited Sept. 13, 2006) <http://www.tsa.gov/travelers/airtravel/screening/index.shtm> 19

In the Supreme Court of the United States

No. 06-211

JOHN GILMORE, PETITIONER

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 435 F.3d 1125. The opinion of the district court (Pet. App. 27a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2006. A petition for rehearing was denied on April 5, 2006 (Pet. App. 42a). On June 20, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 4, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The federal government protects against airline hijacking and similar threats through a comprehensive statutory and regulatory regime. Federal law prohibits certain conduct that is threatening or dangerous to airline security and safety, such as "aircraft piracy," threatening or assaulting a member of a flight crew, or taking any action posing an imminent threat to the safety of the aircraft or other individuals on board. See 49 U.S.C. 46502(a), 46318. It is also a crime to carry a concealed weapon, loaded firearm, or explosive device on board an aircraft, or while attempting to board. 49 U.S.C. 46505(b). All passengers and property must be screened before boarding, see 49 U.S.C. 44901(a) (Supp. III 2003), to ensure that no one is carrying a dangerous weapon or similar device, 49 U.S.C. 44902(a) (2000 & Supp. III 2003); see 49 C.F.R. 1540.107. Airlines must "refuse to transport" a passenger who does not consent to a search of his person or baggage, 49 U.S.C. 44902(a) (2000 & Supp. III 2003); 49 C.F.R. 1540.107, and they are authorized to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety," 49 U.S.C. 44902(b) (Supp. III 2003).

b. Congress has charged the Under Secretary of Transportation for Security, who is the head of the Transportation Security Administration (TSA), with overall responsibility for airline security, and has conferred on him authority to carry out that responsibility. 49 U.S.C. 114(d) (Supp. III 2003).[1] The Under Secretary

---

[1] The Under Secretary and TSA itself were both originally placed within the Department of Transportation. 49 U.S.C. 114(a) and (b)(1) (Supp. III 2003). TSA's functions, as well as the Under Secretary's,

must take "necessary actions to improve domestic air transportation," 49 U.S.C. 44904(c) (Supp. III 2003), in part by promulgating "regulations to protect passengers and property on an aircraft * * * against an act of criminal violence or aircraft piracy," 49 U.S.C. 44903(b) (2000 & Supp. III 2003). The Under Secretary can also issue "Security Directive[s]" to aircraft operators when he "determines that additional security measures are necessary to respond to a threat assessment." 49 C.F.R. 1544.305(a). Compliance with those Directives by air transport personnel is mandatory. 49 C.F.R. 1544.305(b).

The Under Secretary must also ensure that federal agencies "share * * * data on individuals identified * * * who may pose a risk to transportation or national security," "notify[] * * * airport or airline security officers of the identity of [such] individuals," and "establish policies and procedures requiring air carriers * * * [to] prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual." 49 U.S.C. 114(h)(1)-(3) (Supp. III 2003). TSA has implemented those provisions through a series of Security Directives and Emergency Amendments to air carrier security programs, which include a list of individuals who are either barred from boarding an aircraft altogether (the "no fly list") or required to

---

were transferred from the Department of Transportation to the Department of Homeland Security (DHS) pursuant to Section 403(2) of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2178 (6 U.S.C. 203(2) (Supp. IV 2004)). The Under Secretary is now known as the Administrator of the TSA. 49 C.F.R. 1500.3. Because federal statutes continue to refer to the head of TSA as the "Under Secretary," we do so in this brief as well.

undergo additional screening prior to boarding (the "selectee list").

c. Except in narrowly-defined circumstances, federal law prohibits the disclosure of sensitive security information related to commercial air travel. Notwithstanding the Freedom of Information Act, 5 U.S.C. (2000 & Supp. IV 2004) (FOIA), "the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would * * * be detrimental to the security of transportation." 49 U.S.C. 114(s)(1)(C) (Supp. III 2003); see 49 U.S.C. 40119(b)(1)(C) (Supp. III 2003) (similar authority for Secretary of Transportation).

Pursuant to that authority, the Under Secretary has defined a set of information known as "sensitive security information" (SSI), see 49 C.F.R. 1520.3, and directed that such information shall not be disclosed except in certain limited circumstances not applicable here. 49 C.F.R. 1520.9(a)(2) ("A covered person must * * * [d]isclose * * * SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA.").[2] The Under Secretary has defined SSI to include "[a]ny security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including * * * [a]ny aircraft operator or airport operator security program" and "[a]ny

---

[2] Covered persons are defined in 49 C.F.R. 1520.7. Persons with a need to know are defined in 49 C.F.R. 1520.11. Petitioner did not argue below, and does not argue now, that he is a covered person or has a need to know.

Sensitive security information may be disclosed if TSA provides in writing that it is "in the interest of public safety or in furtherance of transportation security" to do so. 49 C.F.R. 1520.5(b).

Security Directive * * * [i]ssued by TSA." 49 C.F.R. 1520.5(b)(1)(i), (b)(2)(i). By regulation, aircraft operators must also "[r]estrict the distribution, disclosure, and availability of information contained in the security program to persons with a need-to-know." 49 C.F.R. 1544.103(b)(4).

2. a. On July 4, 2002, petitioner arrived at the Oakland International Airport with a ticket to fly to Baltimore-Washington International Airport. Petitioner presented his ticket to representatives at Southwest Airlines, but refused to show any identification when asked to do so by the Southwest representatives. The airline informed petitioner that he would not be permitted to board without showing identification, but he again refused and asked if he could fly without showing identification. The airline employee told petitioner that he could choose instead to be screened at the boarding gate rather than present identification. Petitioner then went to the boarding gate but again refused to show identification. Petitioner was not permitted to board, and he then left the airport without further incident. Pet. App. 5a-6a; C.A. E.R. 5-6.

The same day, petitioner went to the San Francisco International Airport to buy a ticket to Washington, D.C. from United Air Lines. While at the ticket counter, petitioner saw a sign that read: "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." Petitioner was again asked to present identification, and he once again refused. Petitioner was told by United personnel that he could not fly without showing identification, but was subsequently informed by airline personnel that he could choose either to show identification or be a "selectee," which meant that he would be subject to an "intense search" of his person

and property—a search more intensive than would otherwise be conducted if petitioner showed his identification. Petitioner refused both options, and he once again left the airport without further incident. Pet. App. 6a-7a; C.A. E.R. 6-7.

b. On July 18, 2002, petitioner filed this action in the United States District Court for the Northern District of California.[3] Petitioner alleged that respondents have issued "security directives requiring that airlines demand travelers reveal their identity before they are permitted to board an airplane." C.A. E.R. 5. Petitioner contended that the identification-or-search requirement violates due process because the alleged security directives containing the requirement are unpublished and therefore do not provide him with sufficient notice. *Id.* at 12. Petitioner further argued that those directives vest standardless discretion in those who enforce them, and hence violate due process. *Ibid.* He also contended that the asserted requirement violates his Fourth Amendment right against unreasonable searches and seizures, *id.* at 12-13; his right to travel, *id.* t 13; and his First Amendment rights to associate and petition the

---

[3] The federal defendants named in the complaint are the Attorney General of the United States; the Director of the Federal Bureau of Investigation; the Secretary of Transportation; the Administrator of the Federal Aviation Administration; the Administrator of the Transportation Security Administration; and the Secretary of the Department of Homeland Security. See Pet. ii. See also C.A. E.R. 87; Pet. App. 28a n.2.

Petitioner also named United Air Lines and Southwest Airlines in his complaint. United filed a petition for bankruptcy and claims against it were stayed pursuant to the Bankruptcy Code's automatic stay provision. 11 U.S.C. 362(a). All parties agreed in the district court to sever all claims against United Air Lines. See C.A. E.R. 86; Pet. App. 28a n.1.

government for redress of grievances, *id.* at 13-14.[4] Finally, the complaint criticized many other alleged government activities, such as the government's definition of a "terrorist," *id.* at 3, 10, "scrutiniz[ation] by facial-recognition systems," *id.* at 11, and "the government's plan to create huge, integrated databases by mingling criminal histories with credit records, previous travel history and much more, in order to create dossiers on every traveling citizen," *id.* at 2-3.

c. The district court granted the government's motion to dismiss. Pet. App. 27a-41a. The court first held that petitioner lacked standing to challenge anything other than the alleged identification-or-search requirement. *Id.* at 30a-32a. Because petitioner's only alleged injury was his inability to board an airplane, and because the only alleged cause of that injury was the identification-or-search requirement, petitioner had standing only to challenge that requirement. *Id.* at 31a-32a.

Next, the district court held that it lacked jurisdiction to entertain petitioner's due process claim. Pet. App. 32a-34a. Because 49 U.S.C. 46110(a) (Supp. III 2003) vests exclusive jurisdiction in the courts of appeals to review an "order issued by the * * * Under Secretary of Transportation for Security," and because petitioner's due process claim "squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security," Pet. App. 33a, the court held that it lacked jurisdiction over the due process claim.

---

[4] Petitioner also brought a claim under FOIA and a claim under the Equal Protection Clause. C.A. E.R. 14-15. He withdrew those claims before the district court. Pet. App. 28a n.3.

The district court rejected petitioner's Fourth Amendment claim on the merits. Pet. App. 34a-38a. The court held that the request for identification was not a seizure because petitioner was free to refuse the request and leave the airport. *Id.* at 34a-37a. The court further held that a search before boarding an airplane is not unreasonable under the Fourth Amendment, because it is no more extensive than necessary, confined in good faith to a search for weapons or explosives, and passengers can avoid the search by choosing not to fly. *Id.* at 37a-38a.

The court similarly concluded that the challenged identification-or-search requirement does not unreasonably burden petitioner's right to travel, because it applies only to one form of transportation. Pet. App. 38a-39a. Finally, the district court rejected petitioner's right-to-associate and right-to-petition claims, because the identification-or-search requirement imposed only a minimal, indirect or incidental burden on those rights. *Id.* at 39a-40a.

d. The Ninth Circuit affirmed. Pet. App. 1a-26a. The court held that petitioner lacked standing to challenge anything other than the identification-or-search requirement, *id.* at 14a-16a, and that the district court had lacked jurisdiction over all of petitioner's remaining claims because exclusive jurisdiction was vested in the court of appeals, *id.* at 9a-13a. To cure the jurisdictional defect, however, the court transferred the case to itself under 28 U.S.C. 1631, see Pet. App. 13a-14a, and reached the merits of petitioner's claims.

The court of appeals (Pet. App. 16a-18a) rejected petitioner's due process claim that he received inadequate notice of the identification-or-search requirement because petitioner "had *actual notice*" of the identification-

or-search requirement: "several airline personnel * * * told him that in order to board the aircraft, he must either present identification or be subject to a 'selectee' search." *Id.* at 17a (emphasis added).

The court also held that the identification-or-search requirement did not vest unbridled discretion in airline security personnel. Pet. App. 18a. Reviewing materials that the government had filed *in camera* and *ex parte* (see p. 11, *infra*), the Court found that the requirement "articulates clear standards." *Ibid.* Furthermore, "because all passengers must comply with the identification policy, the policy does not raise concerns of arbitrary application." *Ibid.*

The court of appeals rejected petitioner's remaining claims as well. The court explained that the identification-or-search requirement does not violate petitioner's right to travel because it applies to only one form of transportation, Pet. App. 19a-20a, and is not an unreasonable burden on that right, *id.* at 20a-21a. Nor, in the court's view, does the requirement violate the Fourth Amendment, because a request for identification is not a seizure if petitioner is permitted to refuse and walk away, *id.* at 21a-22a, and any search is reasonable because it is a limited intrusion, confined to the administrative need justifying the search (preventing passengers from carrying weapons or explosives onboard), and a person is free to avoid the search by electing not to fly, *id.* at 23a-24a. Finally, the court rejected petitioner's right-to-associate and right-to-petition claims, because neither right was unreasonably burdened. *Id.* at 25a-26a.

e. As noted above, petitioner's complaint alleges the existence of certain security directives and that those directives contain the identification-or-search require-

ment. In the proceedings below, respondents did not publicly confirm the existence or content of the alleged security directives. They did so for two reasons. First, because the government moved to dismiss, all the parties and the courts below were required to assume the truth of petitioner's allegations as stated in his complaint—including the existence of certain security directives and the content of an identification-or-search requirement. Accordingly, it was unnecessary and irrelevant for the government to comment on the truth of petitioner's allegations, as it would have been in any case in which the government moved to dismiss. Second, as noted above (p. 4-5, *supra*), TSA security directives constitute sensitive security information. Therefore, under the applicable federal statute and accompanying regulations, and absent any relevant exception, they may not be disclosed in open court, to petitioner, or to petitioner's counsel.

The sole exception, however, is that prior to briefing in the court of appeals, TSA determined that "releasing *certain portions* of security procedures will improve transportation security to a greater extent than maintaining confidentiality of the procedure." 69 Fed. Reg. 28,070-28,071 (2004) (emphasis added). The agency thus made public that "as part of its security rules, TSA requires airlines to ask passengers for identification at check-in." *Ibid.*[5]

---

[5] TSA has publicly disclosed *some portions* of its security procedures. Petitioner repeatedly suggests, however, that respondents have acknowledged the existence of certain security directives and their entire contents. See, *e.g.*, Pet. 7-8. That claim is incorrect. Respondents never confirmed whether the allegations in petitioner's complaint were correct; respondents simply assumed them to be true for purposes

Before the court of appeals, however, respondents moved to file relevant materials under seal, for that court's *in camera* and *ex parte* review, which the court granted following oral argument.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner has not pointed to any other decision that has even considered the question whether TSA gives adequate notice of the identification-or-search requirement. Moreover, notwithstanding his long discourse on the history of written statutes and the importance of notice generally, petitioner does not seriously challenge the court of appeals' actual holding: that because petitioner "had actual notice" of the identification-or-search requirement at issue, he had adequate notice of it for due process purposes. See Pet. App. 17a. In any event, petitioner's as-applied due process challenge is fact-bound and does not present an issue of widespread national importance. This Court's review is unwarranted.

1. Petitioner presents only one question for review, arguing that, because the identification-or-search requirement is unpublished, it fails to provide him with adequate notice of what the law requires.[6] As the court

---

of its motion to dismiss. Respondents were clear on that point in both their brief below, see Gov't C.A. Br. 9-10 n.6, and at oral argument.

[6] Petitioner does not pursue any of the other numerous constitutional challenges presented below, including his due process challenge that TSA's requirement confers unfettered discretion on security officials, or that the requirement violates his rights under the First Amendment and the Fourth Amendment. Moreover, although the petition makes brief reference to the rights to travel and assemble, see Pet. 10, it does not actually present any argument that those rights are

of appeals correctly held, however, petitioner "had *actual notice* of the identification policy."[7] Pet. App. 17a (emphasis added). Petitioner alleged in his complaint that he saw a sign at the airport reading "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN," *ibid.*; C.A. E.R. 6, and petitioner was told by each airline involved that he could either present identification or submit to a more extensive search, Pet. App. 5a (Southwest clerk "informed Gilmore that he could opt to be screened at the gate in lieu of presenting the requisite identification"); *id.* at 6a (United employee "informed Gilmore that he could fly without identification by undergoing a more intensive search"); C.A. E.R. 5, 7. In fact, petitioner had actual knowledge of the requirement *before* he went to the airports, as the very purpose of his trip was to travel to Washington, D.C. to protest the requirement. Pet. 5.

Petitioner argues that adequate notice must be something he can "*see*," Pet. 9, describing at length the history of written statutes, *id.* at 14-17. The argument is incorrect. Due process may be satisfied by "*oral* or written notice," *Goss* v. *Lopez*, 419 U.S. 565, 581 (1975) (emphasis added), that is "of such nature as reasonably to convey the required information," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 536 (1985) (due process satisfied by "oral or written notice").

---

violated; nor are such questions fairly encompassed in his question presented, see Pet. i. In any event, like the issue actually presented, none of those questions would warrant this Court's review.

[7] The court of appeals' phrase "identification policy" refers to both alternatives—either presenting identification or submitting to a more exacting search. See Pet. App. 3a.

The oral instructions given to petitioner by airline personnel plainly supplied the requisite notice.[8]

Nor, as petitioner claims, was he "misinformed" by the oral notice. Pet. 4 n.2; see also Pet. 5, 9. Petitioner alleges that one Southwest employee did not offer him the alternative of a more extensive search in lieu of presenting identification, Pet. 8 n.3, but as the court of appeals noted, by that time the airline had already explained both alternatives to petitioner. Pet. App. 5a-6a. Petitioner also asked United employees if he could fly without showing identification. As alleged in his complaint, although one clerk initially thought that identification was always required, another United employee quickly explained to petitioner the alternative search option. C.A. E.R. 7. Petitioner's due process claim of inadequate notice thus ultimately rests upon his allegation that one airline clerk initially informed him of one requirement, before being corrected by another clerk. That allegation is hardly tantamount to a deprivation of the adequate notice required by the Due Process Clause.

Even if written publication were required to satisfy due process, the relevant law is, in fact, published. The law is quite clear that a passenger may not commit aircraft piracy, 49 U.S.C. 46502(a)(2), may not physically assault or threaten a member of a flight or cabin crew or

---

[8] Petitioner's argument (Pet. 2, 8 n.3) for written notice based on the Federal Register Act, 44 U.S.C. 1505, is misplaced. That statute applies to "Presidential proclamations and Executive orders" and other documents not at issue here. 44 U.S.C. 1505(a). Nor did petitioner raise that statute below. Equally misplaced is petitioner's invocation (Pet. 3, 19) of FOIA. Petitioner specifically abandoned his FOIA claim, see note 4, *supra*, and Congress has authorized TSA to promulgate regulations prohibiting the disclosure of information "[n]otwithstanding section 552 of title 5." 49 U.S.C. 114(s)(1) (Supp. III 2004).

take any action that poses an imminent threat to the safety of the aircraft or other individuals on board, 49 U.S.C. 46318, and may not have a concealed weapon, loaded firearm, or explosive device on one's person or in one's property while on board, or attempting to board, an aircraft, 49 U.S.C. 46505(b). Petitioner, of course, is entitled to notice of those laws, so that he may "understand what conduct is prohibited," *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), and he in fact has full notice of those laws as they are published in the United States Code.

What petitioner seeks, however, is not notice of the law but notice of the *law enforcement detection techniques* that respondents might use to detect or deter violations of the law. But citizens have no due process entitlement to advance notice of such information. For instance, citizens have the right to know in advance that trafficking in illegal drugs is a crime, but they have no due process right to advance notice of a drug trafficking profile that the government might use to identify potential criminals. Similarly, passengers have a right to know the law, but they have no due process entitlement to advance notice of how the government might attempt to discover whether the law is being broken. The identification-or-search requirement is a technique used to detect possible violations of the law, such as the prohibition on carrying a weapon or explosive onto the plane, 49 U.S.C. 46505(b), or a violation of the no-fly list.[9]

Under FOIA, materials describing the "investigative techniques" of a government agency are exempt from

[9] As noted above, petitioner was not punished for refusing to show identification or submit to a search before boarding, nor was he sanctioned for attempting to board an airplane after that refusal.

disclosure, because disclosure would "assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection." *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978). Disclosure in such cases "would not promote lawful behavior; it would only facilitate law evasion." *Id.* at 548. See also *Hardy* v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980) ("We hold that law enforcement materials, disclosure of which may risk circumvention of agency regulation, are exempt from disclosure."); *Hawkes* v. *IRS*, 467 F.2d 787, 795 (6th Cir. 1972) (nondisclosure is appropriate "where the sole effect of disclosure would be to enable law violators to escape detection"). The same principle applies to advance notice under the Due Process Clause: petitioner has a due process right to know what the law is, so that he may conform his actions to it rather than be subject to criminal sanctions, but he has no corollary due process right to know the details of how the government intends to detect violations. If petitioner's due process argument were correct, he and all others would have a constitutional right to advance notice of the details of *all* airline security procedures, a prospect that would serve no due process interest, but that would obviously aid those who want to avoid or circumvent airline security measures.

2. a. Petitioner argues in the alternative (Pet. 18-21) that the alleged security directives at issue may not be prohibited from disclosure under 49 U.S.C. 114(s) (Supp. III 2003), either because they do not contain "information" as required by the statute, Pet. 19, or because TSA has not made certain factual findings, Pet. 20. Contrary to petitioner's claim (Pet. 18 n.5), the court of appeals did not reach either question, nor did petitioner present

them below. Respondents did maintain below that security directives constitute sensitive security information and therefore cannot be disclosed under applicable law, see Pet. App. 7a & n.3, and the court of appeals ordered respondents to file relevant materials under seal for *in camera, ex parte* review, *id.* at 9a, but the court of appeals had no occasion to decide whether any applicable directives were, in fact, prohibited from disclosure under law because petitioner never argued to the contrary.[10]

Petitioner's argument, moreover, is entirely different from the one he raised in the court of appeals. Petitioner never argued for *disclosure* of security directives. In fact, he specifically abandoned his claim for disclosure under FOIA. See note 4, *supra*. And the petition does not seek review of the court of appeal's decision to review the relevant materials *ex parte* and *in camera*. Instead, petitioner argued that, because TSA did not disclose relevant security directives, those directives should be *voided* for lack of adequate notice. The claim that directives should be voided for lack of notice is entirely different from the claim that respondents incorrectly failed to disclose the directives. Indeed, the claim that directives should be voided for lack of notice is entirely dependent on the agency's *non*-disclosure. Having abandoned any claim that disclosure of security directives is required, petitioner may not now contend that the agency's decision to prohibit disclosure was improperly made.

---

[10] Petitioner did object below to respondents' motion to file materials under seal for *in camera, ex parte* review, but his objection was not based on the argument that the materials were improperly classified as sensitive security information.

b. Even if the Court were to reach the issue, petitioner's argument is meritless. Petitioner first argues that the alleged security directives do not contain "information," as the governing statute requires. Pet. 19. But the ordinary dictionary definition of that word encompasses instructions relating to airline security measures. See 7 *The Oxford English Dictionary* 944 (2d ed. 1989) (defining "information" to mean "[a]n item of training; an instruction"). Moreover, TSA has construed the governing statute to permit the non-disclosure of security directives, see 49 C.F.R. 1520.5(b), and because Congress has expressly granted rulemaking authority to TSA in this precise area, see 49 U.S.C. 114(s)(1)(C) (Supp. III 2003), the agency's interpretation is entitled to deference so long as its construction is a reasonable one, see *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). Petitioner has not and cannot show that the agency's construction of the word "information" to include instructions on security measures is unreasonable.

Petitioner also argues that the government has never explained why non-disclosure is necessary. Pet. 20. This, of course, is because petitioner never raised any such challenge to the SSI determination. In any event, it is plain that disclosures of security procedures only aid those who would seek to circumvent them, thereby posing a risk to airline safety. Although TSA has concluded that *some portions* of security procedures may be disclosed because doing so will improve security in specific situations, the agency is plainly entitled to make case-by-case determinations as to whether disclosure is harmful or helpful. Petitioner offers no reason to question the agency's decision in this particular case.

3. The question presented does not have widespread national importance. Although petitioner alleges (Pet.

1, 9) that the identification-or-search requirement is applied to millions of airline passengers, petitioner's specific due process claim is not a facial challenge that could potentially apply to many others, but is an as-applied challenge peculiar to him and dependent upon the allegations stated in his complaint. Accordingly, the question presented has relevance only for petitioner.

As noted above, petitioner's due process claim of inadequate notice essentially reduces to the contention that he was allegedly told two different requirements by two different airline clerks. But that claim is entirely dependent upon the specific allegations in petitioner's complaint, and any due process ruling on that particular claim would have no impact upon the millions of other airline passengers. Rather, petitioner's due process challenge is that the identification-or-search requirement did not provide adequate notice *as it was applied to him*, because he was allegedly misled as to its requirements by what employees of Southwest and United said to him in particular. Pet. 8 n.3; see Pet. C.A. Br. 2 (phrasing question presented as an as-applied challenge). Accordingly, petitioner's narrow, as-applied due process claim has no national significance warranting this Court's review.

Finally, petitioner relies upon a statement on TSA's website in March 2006 stating that a passenger "must present one form of photo identification." Pet. 10. But the website currently states:

> We encourage each adult traveler to keep his/her airline boarding pass and government-issued photo ID available until exiting the security checkpoint. The absence of proper identification will result in additional screening.

TSA, *Our Travelers: The Screening Experience* <http://www.tsa.gov/travelers/airtravel/screening/index.shtm> (visited Sept. 13, 2006). To the extent that petitioner's question presented relies on the old website statement, the question does not have any ongoing relevance.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
JOSHUA WALDMAN
Attorneys

NOVEMBER 2006

---

[11] Congress, moreover, has recently provided for new procedures for dealing with lawful requests to TSA for SSI information, including during the course of civil litigation. See Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525(a)(1) and (d), 120 Stat. 1355, 1381-1382. Thus, any issue concerning the TSA's process for handling SSI information in the context of civil litigation is of limited ongoing significance.

(6)

No. 06-211

Supreme Court, U.S.
FILED
NOV 29 2006
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

JOHN GILMORE,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Thomas R. Burke
DAVIS WRIGHT
TREMAINE LLP
505 Montgomery Street
Suite 800
San Francisco, CA 94111

Thomas C. Goldstein
Counsel of Record
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036-1564
(202) 887-4060

Rochelle L. Wilcox
DAVIS WRIGHT
TREMAINE LLP
865 S. Figueroa St.
Suite 2400
Los Angeles, CA 90017

James P. Harrison
LAW OFFICE OF JAMES P.
HARRISON
980 Ninth Street, 16th Floor
Sacramento, CA 95814

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 10

ADDENDUM

TABLE OF AUTHORITIES

CASES:

Caplan v. *Bureau of Alcohol, Tobacco & Firearms*,
587 F.2d 544 (2d Cir. 1978) 7

Cleveland Bd. of Educ. v. *Loudermill*,
470 U.S. 532 (1985) 3

Goss v. *Lopez*,
419 U.S. 565 (1975) 3

Hardy v. *Bureau of Alcohol, Tobacco & Firearms*,
631 F.2d 653 (9th Cir. 1980) 7

Hawkes v. *IRS*,
467 F.2d 787 (6th Cir. 1972) 7

Mullane v. *Central Hanover Bank & Trust Co.*,
339 U.S. 306 (1950) 3

STATUTES AND REGULATIONS:

49 U.S.C. 114(s) 7, 8

49 C.F.R. 1520.5(b)(2)(i) 9

OTHER AUTHORITIES:

TSA, *The Screening Experience, Access Requirements*,
at http://www.tsa.gov/travelers/airtravel/
assistant/editorial_1044.shtm 5

TSA Press Release, *Airports, Airlines and TSA Join Together to Educate Travelers on How to Prepare for Holiday Travel* (Nov. 16, 2006), available at http://www.tsa.gov/press/releases/2006/press_release_11162006.shtm 6

REPLY BRIEF FOR PETITIONER

This case presents a profound constitutional question in a singularly important context. Every day in this country, millions of Americans travel by air. Every one of them is subject to a legal requirement to show identification or undergo more extensive screening. The *substance* of the legal rule imposing those requirements is not a secret because the Transportation Security Administration (TSA) has acknowledged it on its web site for all to see. See BIO 18. (Though, as we discuss *infra* at 4-6, the government continues to misstate the law to millions of travelers every day.) But the government inexplicably refuses to publish the text of the legal rule.

This is moreover the single most important context in which the question presented could arise. The number of individuals directly affected by the policy in question is incomparable. The record also establishes the grave dangers of the government's position: when the government aggrandizes the power to announce but not publish the law, it is free to *misstate* the law, for citizens are completely disabled from determining whether the government is shading the truth or making things up outright. That is what happened to petitioner, and what continues to happen on a daily basis to countless passengers in every airport in the country, where TSA maintains signs (falsely) telling travelers that they are required to show identification before they may travel. See BIO 5 (quoting the signs at the airport through which petitioner traveled, which remain in place).[1]

---

[1] The government contends that petitioner's claim is fact-bound. BIO 11, 18. But petitioner's request to be provided the relevant section of the directive has been denied. He thus is in the same position as any other American. The government notes that a private airline employee orally advised him of the requirements of the directive. *Id.* at 18. That fact is irrelevant to petitioner's claim, which is that the government cannot

The brief in opposition is one part legal argument, and nine parts obfuscation. The legal argument only serves to emphasize the importance of the question presented: the stated position of the Executive Branch is that due process is satisfied so long as it *tells* you the law; trust it, for it is under no obligation to *show* you the law. BIO 12-13. That is not correct: due process requires publication of the law itself. The disagreement framed by the case over whether the legal rule must be published or may be conveyed less formally is clear; certiorari should be granted here to decide the issue.

The obfuscation by the government is an effort that cannot possibly succeed because the issue is so very simple: petitioner is not asking this Court to order the government to publish the "no fly list," the criteria for deeming a passenger a security threat, or indeed any piece of security information. Contra BIO 14-15. Rather, the question is whether the government can – without any plausible explanation – enforce against the general public a law, the text of which it insists must be kept secret.

Because the legal principle at stake is vitally important but has never been settled by this Court, and because the Executive Branch's position is contrary to basic principles of due process, certiorari should be granted.

* * *

As TSA's web site now acknowledges, the government enforces what it labels for the first time in this case the "identification or search" requirement. TSA (and its predecessor the Federal Aviation Administration) adopted that requirement in a directive to the airlines, and it has

---

enforce a rule it refuses to publish. In any event, here too, petitioner is in no different position than millions of travelers who are advised orally by airline employees regarding federally-imposed security procedures.

resolutely kept the directive *itself* a secret while simultaneously disclosing its *contents*. (As the petition explains (at 21 n.8), petitioner challenges TSA's attempt to enforce the directive, the contents of which TSA has made public, without publishing the directive itself; if the directive contains "sensitive" information, TSA bears the burden of indicating what material should be redacted.) Petitioner's contention is that the government's insistence on enforcing a directive it refuses to disclose violates the Constitution.

1. The government is wrong in contending that oral notice of the law is sufficient.[2] Due process requires that the law itself be published, absent some extraordinary circumstance not present here. Oral notice of the law's contents is not a sufficient substitute. Petitioner's argument is firmly rooted in the historical traditions that embody the due process of the laws. See Pet. 10-17. For its entire existence, at all levels of government, the United States has published the laws, regulations, and opinions that govern the conduct of its citizens. Hundreds of years before the Constitution was drafted, England began publishing its laws, establishing the common law tradition that our forefathers embraced.

The centuries-old practice of publishing all laws of general application allows the government to fairly demand that the public comply with those laws. On a more fundamental

---

[2] The cases on which the government relies (BIO 12-13) address the notice necessary to ensure that someone has a fair opportunity to be heard before losing a liberty or property interest. They say nothing about the notice that must be given before the government demands that citizens conform their conduct to its laws. In *Goss* v. *Lopez*, 419 U.S. 565, 581 (1975), the question was what notice is required before a school suspension, and in *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985), what notice is required before termination of a public employee. Similarly, in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Court was asked to decide what notice is due before a person is deprived of property.

level, publishing laws gives the public facts needed to engage in democracy. As the petition explains (at 10-15), the drafters of the Constitution viewed open government as a fundamental and necessary part of democracy. The checks, balances, and oversight built into the Constitution were established to permit the public to review the government's actions, debate what it chooses, and make changes where appropriate. The public cannot do this with incomplete and incorrect reporting of the law, which is why the government must *publish* the laws that bind the public.

The government in this case asks the public to trust it. It demands that it be permitted to keep secret the directive that regulates the conduct of hundreds of millions of people each year. It insists, essentially, that it is entitled to give the public inconsistent, even misleading, information about the directive, and demand compliance. But our system of government does not mandate that the public blindly trust the government.[3]

Permitting the government to enforce a secret law invites abuse and confusion in its application. It permits the government to misrepresent the contents of the law to suit its purposes (whatever they may be at the time) and to inappropriately hide provisions that it may not want known. It also deprives the public of the ability to monitor agency compliance regarding enforcement of the law (for example, to ensure that the law is not enforced in a discriminatory manner). The very problems with the secrecy challenged by Gilmore are highlighted by the government's own inconsistent statements about the directive. Airport personnel do not know the standards that they are expected to enforce. Pet. 5.

---

[3] One of Gilmore's amici cogently identifies some of the dangers that may arise from secret law. *Amicus* Br. of Electronic Privacy Information Center, at 9-11.

This case perfectly illustrates the dangers to liberty and democracy of the government's position that it can keep the laws secret without justification. TSA continues to provide the traveling public with inaccurate and inconsistent information. As a consequence, members of the public who are concerned about terrorism are unable to evaluate even these public procedures to question whether they are effective. The government emphasizes that petitioner was told by one airline that, if he did not provide identification, he could travel if he went through additional screening. BIO 5. But the government ignores that the only statement of the law from the *government* – the TSA signs stating that identification was required – were inaccurate, and that other airline employees told petitioner, to the contrary, that he could not fly without showing identification.

2. The government responds that the TSA web site has been updated to state that passengers have the option of additional screening. BIO 18-19. This public statement by the TSA of the directive's contents is absolutely fatal to the government's contention that the formal embodiment of the rule must remain a secret. Moreover, the government ignores the extraordinary inconsistency in its own representations to the traveling public. The airport signs stating that identification must be provided remain unchanged, and inaccurate. Travelers confronting these signs that the government now admits are false have no ability to check the text of the law against actual practices at airports. Other statements on the TSA web site are similarly inaccurate. A page titled "The Screening Experience" "Access Requirements" advises air travelers unambiguously: "You must present a Boarding Pass and a Photo ID to get to the checkpoint and to your gate." TSA, *The Screening Experience, Access Requirements*, at http://www.tsa.gov/travelers/airtravel/assistant/editorial_1044.shtm (last visited Nov. 28, 2006), reprinted at Add., *infra*, 4a. As recently as

November 16, 2006 – as it was submitting its brief to this Court – the TSA issued a press release regarding holiday travel, advising prospective passengers: "You must have a boarding pass and valid government photo ID to enter the security checkpoint." *Airports, Airlines and TSA Join Together to Educate Travelers on How to Prepare for Holiday Travel*, at http://www.tsa.gov/press/releases/2006/press_release_11162006.shtm, reprinted at Add., *infra*, 3a.

3. The government's response to petitioner's showing of the historically-rooted due process right to publication of the laws is empty rhetoric. It asserts that "it is plain that disclosures of security procedures only aid those who would seek to circumvent them, thereby posing a risk to airline safety." BIO 17. This rote invocation of the mantra "the terrorists will win" illuminates the merit of petitioner's position that the Executive Branch cannot be permitted freely to judge for itself when to withhold publication of the laws. The "procedures" in question have *already* been disclosed, because they were disclosed *by the TSA* – as the opposition itself points out, they now are available on TSA's web site. BIO 18. What the government is keeping secret is not the security "procedures" but the proof that the government is in fact accurately describing the law and the means for the citizenry to evaluate the law and comment on or effectively challenge it.

More generally, the government has offered no authority permitting a law of general applicability to be withheld from the public, particularly when its contents are not secret. Instead, the government props up and then attacks a strawman by invoking authority for the proposition that law enforcement detection techniques may be kept secret. BIO 14-15. But Gilmore only challenges the government's insistence on enforcing a law it refuses to publish. Gilmore is not asking for disclosure of "how the government intends to detect violations." Contra BIO 15. The government

simply ignores the difference between laws that apply to the general public, and internal agency rules, regulations, and policies. Federal courts – which have easily drawn the distinction between the two – have made clear that the former must be made publicly available, while the latter need not. Pet. 19-20 n.6.[4] See also *Amicus* Br. of Reporter's Committee for Freedom of the Press, at 8-9 (explaining distinction between investigative techniques and laws of general applicability); *Amicus* Br. of Electronic Frontier Found. *et al.*, at 9-12 (same).

4. Of course, the glaring constitutional infirmity in the government's position can be easily avoided. The government is refusing to disclose the relevant portions of the directive in question on the ground that it is so-called "SSI" (Sensitive Security Information). The governing statute permits information to be deemed SSI only if secrecy is necessary to maintain the "security of transportation." 49 U.S.C. 114(s). The petition explained that the government's position is directly contrary to this statutory requirement: keeping the relevant *text* of the directive secret cannot plausibly be required to maintain security, given that the

---

[4] The government's cases, like the cases cited in the Petition, recognize that if rules governing the behavior of the public are not disclosed, they constitute impermissible "secret law." *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 554 (2d Cir. 1978) ("[a]n administrative manual which sets forth or clarifies an agency's substantive or procedural law should be made available since there is a legitimate public interest in having those affected guide their conduct in conformance with the agency's understanding"); *Hardy* v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980) (recognizing distinction between "law enforcement" materials, which need not be disclosed, and "administrative" materials, involving "the definition of the violation and the procedures required to prosecute the offense," which must be disclosed); *Hawkes* v. *IRS*, 467 F.2d 787, 795 (6th Cir. 1972) ("[i]nformation which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement").

substance of the document is already public. Pet. 18-20. It is telling that the government does not attempt to answer this straightforward point in any way. TSA should not be permitted to flout Congress's directives so freely on a matter that directly affects millions of Americans and that violates a basic tenet of American law.

Separately, the government offers little opposition to Gilmore's claim that 49 U.S.C. 114(s) does not permit this generally-applicable law to be classified as "sensitive security information" and enforced without being publicly disclosed. Pet. 18-21; BIO 17. It apparently has located one dictionary, published nearly two decades ago, that defines "information" as "[a]n item of training; an instruction," and it implicitly argues that the law at issue here falls within that definition. BIO 17. But as discussed above, this is not simply an instruction to a government employee, such as a training manual. This is a law, which mandates compliance by the public and deprives them of their ability to travel by air if they refuse. It is fundamentally different.[5]

The government claims this Court lacks the power to decide the question of the categorization of the directive in this case because petitioner did not challenge below the statutory categorization of the directive as SSI. BIO 16. This claim is not determinative. The court of appeals expressly held that the directive was SSI after reading its text

---

[5] The legislation recently adopted relating to SSI, cited by the government in a final footnote, does nothing to diminish the importance of the issue presented in this case. BIO 19 n.11. SSI that is "incorporated in a current transportation security directive," or is categorized as "security inspection or investigative information," "threat information," "security measures," or "security screening information" – the information Gilmore seeks here – is exempt from disclosure under Section 525(a)(2) of the Act. Thus, the essential question remains whether the government can characterize a generally-applicable law as "sensitive security information."

in camera. Pet. App. 13a n.8 ("*We also determine* that the Security Directive constitutes SSI pursuant to 49 C.F.R. § 1520.5(b)(2)(i), and therefore it did not have to be disclosed to Gilmore." (emphasis added)). The proper characterization of the directive is thus before this Court because it was "passed on" below and is logically antecedent to the constitutional question presented. See Pet. 18 n.5.[6]

Petitioner's inability to challenge the categorization of the directive as SSI in the district court is completely understandable. *The directive was, after all, a secret; petitioner had no way of knowing its contents or even conclusively of its existence*. As the government concedes, in the district court the government "did not publicly confirm the existence or content of the alleged security directives." BIO 10. The order dismissing this case below states: "[T]he federal defendants refuse to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it says." Pet. App. 33a. It was not until 2004 that the government publicly confirmed that "TSA requires airlines to ask passengers for identification at check-in." BIO 10. In its brief to the Ninth Circuit, the government hinted at the existence of the directive, and it finally conceded at oral argument that "the center of this case is a Security Directive." Pet. App. 10a n.6.

Because the government had withheld confirmation even of the existence of the directive from petitioner up to and including the time he filed his opening brief in the court of appeals, he could not reasonably have been expected to mount a challenge at that time. When he filed his reply brief, however, he did make this challenge, arguing that "Defendants try to collapse an entire system of secret law,

---

[6] Nor have Gilmore's other claims been abandoned. BIO 11 n.6. Rather, Gilmore's claims that are dependent on the content of the directive will be addressed on remand.

regulations, and security directives into the phrase 'identification-or-search requirement" and innocuously term it a 'law-enforcement-detection technique.'" Reply Brief ("RB") 2. That brief explicitly challenges the government's characterization of this law as "information," argues that such a characterization "violates both due process and common sense," and claims that "the Under Secretary has plainly exceeded the scope of his authority" by treating a generally-applicable law as SSI. *Id.* at 24-25. Gilmore more than adequately raised this issue below at the earliest available opportunity.[7]

CONCLUSION

For these reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

---

[7] The government vaguely asserts that, given the arguments petitioner made below, he "may not now contend that the agency's decision to prohibit disclosure was improperly made." BIO 16. That claim goes only to the question of whether this Court may decide the antecedent issue of whether the directive is appropriately categorized as SSI; for the reasons discussed above, the issue is presented here. There is *no* dispute that petitioner's constitutional challenge is properly presented here, and the government does not contend otherwise. Gilmore repeatedly argued below that the government's refusal to publish the law requiring identification to board an aircraft violated due process. *E.g.*, Opening Brief ("OB") 34 ("nonpublication of a law that affects a multitude of the protected rights of every citizen clearly violated due process"); *id.* 36 ("[s]ecret law is an abomination" and violates due process); *id.* 38 (secret law increases likelihood of error and abuse); RB 1 (one of the two issues in the case is whether laws requiring identification to travel domestically can be kept secret). Indeed, many of Gilmore's other arguments were predicated on the inappropriate secrecy of the directive. Gilmore's argument that the directive was void for vagueness, for example, was premised on the fact that its contents were hidden. OB 40. Similarly, Gilmore challenged the government's insistence that Gilmore litigate his constitutional claims without access to the directive. *Id.* 35-36.

Thomas R. Burke
DAVIS WRIGHT
TREMAINE LLP
505 Montgomery Street
Suite 800
San Francisco, CA 94111

Thomas C. Goldstein
Counsel of Record
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036-1564
(202) 887-4060

Rochelle L. Wilcox
DAVIS WRIGHT
TREMAINE LLP
865 S. Figueroa St.
Suite 2400
Los Angeles, CA 90017

James P. Harrison
LAW OFFICE OF JAMES P.
HARRISON
980 Ninth Street, 16th Floor
Sacramento, CA 95814

ADDENDUM

ADDENDUM

Airports, Airlines and TSA Join Together to Educate Travelers on How to Prepare for Holiday Travel

Knowing 3-1-1 Ensures Secure Efficient Screening

(available at http://www.tsa.gov/press/releases/2006/press_release_11162006.shtm)

WASHINGTON, Nov. 16 /PRNewswire/ -- The Air Transport Association (ATA), Airports Council International - North America (ACI-NA) and the Transportation Security Administration (TSA) are informing the traveling public how they can prepare for security screening during the busy holiday travel season.

Passengers can greatly affect their experience at the airport by preparing in advance. This includes: Packing liquids, gels and aerosols in checked baggage whenever possible, using 3-1-1 for carry-ons, arriving early and ensuring they are not traveling with prohibited items.

For individuals who must carry liquids, gels and aerosols through the security checkpoint, it's as easy as 3-1-1.

• All liquids, gels and aerosols must be placed in a 3 ounce or smaller container.

• These containers must be placed in a 1 quart, clear, plastic, zip-top bag.

• 1 bag per passenger placed in a plastic bin for screening.

The limitation on liquids reflects changes made after the foiled terror plot involving the possible use of liquid explosives in London on August 10, 2006. In response, TSA immediately banned all liquids at security checkpoints. The

ban was modified on September 25 after extensive testing showed that small amounts of liquids, gels and aerosols did not pose a significant threat.

TSA Administrator Kip Hawley said, "By knowing the rules and remembering 3-1-1, travelers can make a big difference in TSA's ability to efficiently and effectively screen all passengers and their baggage. Each time a physical inspection of a carry-on bag is required, it not only slows the individual traveler down but the entire security line."

The 12-day Thanksgiving holiday period is traditionally the busiest of the year and ATA predicts 25 million passengers will take to the skies Friday, November 17 through Tuesday, November 28.

"Airports will be packed for periods of time over this Thanksgiving season and the best advice is to be prepared," ATA President and CEO James C. May. "The airlines have no greater priority than the safe and convenient travel of our customers and we will work with TSA and ACI-NA to ensure this happens."

Through posters at ticket counters, banners at airports, advertisements on parking shuttles, road signs, extra customer service staff, travel tips on each organization's web site and many other ways, the airlines, airports and TSA are educating travelers before they reach the security checkpoint.

Through the combined efforts of airport and airline staff and the TSA, we're making an unprecedented effort to ensure that passengers have the information they need to get through security checkpoints efficiently this holiday season," said ACI-NA President Greg Principato.

Below are other tips travelers should know before they leave home this holiday season. A full list of tips and prohibited

items is available at http://www.tsa.gov.

Do not wrap gifts. If a security officer needs to inspect a package they may have to unwrap your gift. Please wrap gifts after arriving at your destination.

Pack smart. Bringing prohibited items to the airport will delay the screening process for you and other passengers. If you're not sure which items are allowed, check TSA's Web site for a complete list.

Arrive on time. Arrival time recommendations vary by airline and day of travel, so check with your carrier. You must have a boarding pass and valid government photo ID to enter the security checkpoint. Remember to give yourself adequate time to check your baggage and move through security.

Dress the part. Metal in your clothing may set off the walk-through metal detector. Pack coins, keys, jewelry, belt buckles and other metal items in your carry-on bag. Remember that all shoes must be removed and screened by TSA. Passengers also need to remove blazers, suit coats and bulky sweaters in addition to outer garments.

Film. Undeveloped film should go in your carry-on bag. Hand film that is faster than 800-speed to a security officer for physical inspection to avoid being X-rayed.

Think. Belligerent behavior, inappropriate jokes and threats will not be tolerated. Such incidents will result in delays and possibly missing your flight. Local law enforcement may be called as necessary.

Contact: TSA Public Affairs (571)-227-2829

SOURCE Transportation Security Administration

Transportation Security Administration

The Screening Experience

(available at http://www.tsa.gov/travelers/airtravel/assistant/editorial_1044.shtm)

Access Requirements

You must present a Boarding Pass and a Photo ID to get to the checkpoint and to your gate. There are four ways to obtain a boarding pass:

- Go to your airline's ticket counter at the airport
- Use curbside check-in
- Use your airline's self-service ticket kiosk in the airport lobby
- Print the boarding pass from your airline's Web site

Note: If you need to access the checkpoint for parental, medical business or similar needs you should check with your respective airline for required documentation.

Due to increased security measures, we have some helpful tips for travelers on when to arrive at the airports.

No. 06-211

IN THE

Supreme Court of the United States

JOHN GILMORE,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION, AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, CENTER FOR DEMOCRACY AND TECHNOLOGY, NATIONAL SECURITY ARCHIVE, PROJECT ON GOVERNMENT SECRECY OF THE FEDERATION OF AMERICAN SCIENTISTS, AND SPECIAL LIBRARIES ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DAVID L. SOBEL
Counsel of Record
MARCIA HOFMANN
ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Avenue, NW
Suite 650
Washington, DC 20009
(202) 797-9009

CINDY COHN
LEE TIEN
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333

Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

A. The Laws of the United States Do Not Permit the Executive Branch to Govern Public Conduct Through Secret Laws; Thus, This Court Must Carefully Review the Executive Branch's Attempts to Hide the Content of its Identification Requirement. 5

1. The FOIA's Legislative History Shows That Congress Did Not Intend for Agencies to Create and Govern the Public With Secret Laws. 6

2. FOIA's Affirmative Disclosure Requirements and Judicial Precedent Recognize Congress' Intention Not to Permit the Shielding of Secret Law From the Public 8

B. This Court Should Ensure that TSA Does Not Abuse Its Authority to Designate "Sensitive Security Information" to Impose Secret Laws Upon the Public... 12

1. TSA's Authority to Conceal Information as SSI is Overly Broad and Invites Capricious Application, Which Congress Has Recently Recognized 13

2. TSA Has Used the SSI Designation to Avoid Releasing Harmless or Already Public Information. 16

3. The SSI Designation May Conceal Security Flaws or Illegal Activity, Undermine the Justice System, and Create Confusion. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

U.S. Dep't of the Air Force v. Rose, 425 U.S. 352 (1976).....6, 9

Coastal States Gas Corp. v. U.S. Dep't of Energy, 617 F.2d 854 (D.C. Cir. 1980).....11

Cox v. U.S. Dep't of Justice, 601 F.2d 1 (D.C. Cir. 1976).....10

Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981).....9, 10

U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).....6, 9

Electronic Privacy Information Center v. U.S. Dep't of Homeland Security, 384 F. Supp. 2d 100 (D.D.C. 2005).....16

EPA v. Mink, 410 U.S. 73 (1973).....5, 10

Gordon v. FBI, 390 F. Supp. 2d 897 (N.D. Cal. 2004).....16

Hardy v. BATF, 631 F.2d 653 (9th Cir. 1980).....10

Jordan v. U.S.Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978).....8

Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).....12

Nat'l Treasury Employees Union v. U.S. Customs Serv., 602 F. Supp. 469 D.D.C. 1984).....10

National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975).....9

Renegotiation Bd. v. Bannercraft Clothing Co. Inc., 415 U.S. 1 (1974).....6

Rose v. U.S. Dep't of the Air Force, 495 F.2d 261 (2d Cir. 1974).....6

Schwartz v. IRS, 511 F.2d 1303 (D.C. Cir. 1975) 11

Sterling Drug Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971) 10

Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997)..... 10, 11

Wiesenfelder v. U.S. Dep't of Education, 959 F. Supp. 532 (D.D.C. 1997) 10

Wolfe v. U.S. Dep't of Health and Human Servs., 839 F.2d 768 (D.C. Cir. 1988)..... 10

Statutes and Regulations

14 C.F.R. § 191.1 (1997)..... 14

69 Fed. Reg. 28066, 28082-83 16

49 U.S.C. § 114 ..... 12, 15, 16

5 U.S.C. § 552 ..... passim

Pub. L. No. 107-296-116 Stat. 2312..... 15

Pub. L. No. 107-71 § 101(e)(3), 115 Stat. 597 (2002) 15

Pub. L. No. 93-366 § 316, 88 Stat. 409 (1974) 14

Other Authorities

Building on the Information Sharing Environment: Addressing Challenges of Implementation: Hearing of House Comm. on Homeland Security Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment, 109th Cong. (2006) 13

Congressional Research Service, RL31826, *Protecting Our Perimeter: "Border Searches" Under the Fourth Amendment* (Aug. 15, 2006)..... 9

Congressional Research Service, RL32664, Interstate Travel: Constitutional Challenges to the Identification Requirement and Other Transportation Security Regulations (2004)..... 14

Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131 (2006) 5, 19

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966)..... 8

OpenTheGovernment.org, *Secrecy Report Card 2006* (2006).. 13

RS21727, *Sensitive Security Information (SSI) and Transportation Security: Background and Controversies* (2004) 16, 18, 19

S. Rep. No. 1219, 88th Cong., 2d Sess. (1964)..... 7

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 6, 7

The National Security Archive, *Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information* (March 2006)..... 14

INTEREST OF THE *AMICI CURIAE*[1]

Amici are a group of non-profit organizations that oppose the Executive branch's regulation of public conduct without appropriate checks or transparency. We believe that a thriving democratic society is inconsistent with governance of the public through secret law.

The Electronic Frontier Foundation ("EFF") is a non-profit, public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990 and based in San Francisco, California, EFF has more than 12,000 members and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, http://www.eff.org.

The American Association of Law Libraries ("AALL") is a nonprofit educational organization with over 5000 members nationwide. AALL's mission is to promote and enhance the value of law libraries, to foster law librarianship and to provide leadership and advocacy in the field of legal information and information policy.

The American Library Association ("ALA") is a nonprofit educational organization of over 66,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and the public's right to a free and open information society.

The Association of Research Libraries ("ARL") is a nonprofit association of 123 research libraries in North America. ARL's

---

[1] Neither party has participated in the preparation or financing of this brief. In the interest of fullest disclosure, *amicus* EFF notes that Petitioner Gilmore was a co-founder of the organization, serves on EFF's board of directors and, like many private individuals interested in this field, makes general financial contributions to the operations of EFF.

members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service.

The Center for Democracy and Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff has conducted extensive policy research, published academic papers and analyses, and testified before Congress about the impact of national security concerns on civil liberties, as well as on the need for an open and transparent government.

The National Security Archive (the "Archive") is an independent, non-partisan, non-governmental, non-profit research institute located at the George Washington University, which collects and publishes declassified documents concerning U.S. foreign policy.

The Project on Government Secrecy of the Federation of American Scientists promotes public access to government information through research, advocacy, investigative reporting, and publication of government records.

The Special Libraries Association ("SLA") is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 11,000 members in 75 countries in the information profession, including corporate, academic, and government information specialists. SLA promotes and strengthens its members through learning, advocacy, and networking initiatives. For more information, visit us on the Web at http://www.sla.org.

SUMMARY OF THE ARGUMENT

This case squarely presents one of the most critical civil liberties questions of the post-9/11 era: whether a federal agency may set standards for the conduct of members of the public through rules and requirements the public is not permitted to see. Specifically, this case concerns a mandate imposed by the Transportation Security Agency ("TSA") that apparently requires members of the public to present identification or submit to additional security screening to board a domestic airline flight ("the identification requirement").

A prohibition against secret law is reflected throughout the constitutional and statutory law of this nation. Congress created a mechanism to ensure that agencies would not be permitted to impose secret law when it passed the Freedom of Information Act ("FOIA"), a law that grants the public the right to obtain all government agency records with few exceptions. This Court and others have repeatedly affirmed that the FOIA protects the fundamental principle that the public is entitled to know the laws under which it is governed and the standards of conduct to which it will be held. While the FOIA does allow the government to withhold materials that are specifically exempted from disclosure under another statute, and Congress has given the TSA authority to withhold certain transportation security information under this provision, the identification requirement imposes a behavioral mandate upon the public, and is therefore not the type of information Congress intended for agencies to hide from public scrutiny.

TSA has refused to allow the public to see the actual provisions of the identification requirement, claiming that they constitute unclassified "sensitive security information" ("SSI"). The Court should grant *certiorari* and carefully review the government's SSI designation because TSA's actions are a serious encroachment upon constitutional and statutory protections against secret law. The dangers posed by this encroachment are foreshadowed by the overly broad manner

that SSI regulations promulgated by TSA have been applied in the past. If the Court does not review this case and stem the promulgation and enforcement of secret law by TSA, then all executive branch agencies with responsibility for security matters will feel emboldened to legislate in private. Furthermore, the overly broad application of SSI may hide security flaws and illegal activity, frustrate the justice system, create confusion among the public, and otherwise severely undermine government accountability.

Aviation security is an important governmental objective, but should not serve as an excuse not to hold the government accountable. This Court should grant *certiorari* and exercise its authority to review the propriety of TSA's withholding of the identification requirement from the public.

ARGUMENT

While Congress has passed laws giving the TSA and other agencies some latitude to withhold information from the public that might affect transportation security, Congress never intended to give agencies unfettered discretion to impose requirements upon the public's conduct without allowing the public to review those requirements.

Furthermore, there is significant evidence in the public record that TSA has used its SSI regulations to inappropriately withhold excessive amounts of information from the public. Such secrecy may permit TSA to conceal security weaknesses and illegal activity, undermine the administration of justice, and create confusion about what TSA's regulations require.

For these reasons, it is critical that the Court review TSA's application of the SSI regulations to the identification requirement. *Certiorari* should be granted, and the Ninth Circuit's judgment reversed.

A. The Laws of the United States Do Not Permit the Executive Branch to Govern Public Conduct Through Secret Laws; Thus, This Court Must Carefully Review the Executive Branch's Attempts to Hide the Content of its Identification Requirement.

Congress has granted TSA the ability to designate certain types of unclassified information "sensitive security information" for aviation security purposes. However, the legislative history and case law of the primary federal open government law, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, make clear that Congress never intended to allow agencies unbridled discretion to keep laws or regulations that govern the people's conduct from public review. Although Congress has granted TSA the ability to designate certain types of unclassified information "sensitive security information" for aviation security purposes, Congress did not intend that authority to override constitutional and statutory prohibitions against secret law.

"At a fundamental level, secrecy claims must be measured against our historic and constitutional commitments to government openness." Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 139 (2006). The clearest embodiment of American transparency principles, the FOIA, is a benchmark against which the government's SSI claim in this case should be examined.

The FOIA creates a judicially enforceable right for individuals to obtain government agencies records with a few narrowly drawn exceptions. As explained by this Court, "the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). The law was intended to "pierce

the veil of administrative secrecy and open agency action to the light of public scrutiny." *Rose v. U.S. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974). Since its initial passage forty years ago, the FOIA was amended by Congress to strengthen the public's right to access government information in 1974, 1976, 1986 and 1996.

1. The FOIA's Legislative History Shows That Congress Did Not Intend for Agencies to Create and Govern the Public With Secret Laws.

The FOIA's legislative history makes clear that Congress did not intend for requirements on the public's behavior to be shrouded in secrecy by agencies. When it passed the FOIA, this Court has noted, Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public," *Renegotiation Bd. v. Bannercraft Clothing Co. Inc.*, 415 U.S. 1, 17 (1974) (citation omitted), and "enabl[ing] the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal government activities." *Id.* As this Court has recognized, Congress sought to "eliminate [] secret law." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 796 n.20 (1989) (quoting Frank H. Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. LEGAL STUDIES 775, 777 (1980)).

Prior to the FOIA's enactment in 1966, the primary public disclosure statute was section 3 of the Administrative Procedure Act, which was "of little or no value to the public in gaining access to records of the Federal Government." S. Rep. No. 813, 89th Cong., 1st Sess. (1965). It had, in fact, "precisely the opposite effect: it is cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish to disclose." *Id.* According to the Senate Committee on the Judiciary:

> Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards—or, more precisely, lack of standards—in section 3. It would require almost no ingenuity for any official to think up a reason why a piece of information should not be withheld (1) as a matter of "public interest," (2) "for good cause found," or (3) that the person making the request is not "properly and directly concerned."

S. Rep. No. 1219, 88th Cong., 2d Sess. (1964).

The FOIA was passed specifically to replace this weak and ineffective disclosure law. In their conference reports, the judiciary committees of both the Senate and House of Representatives expressed a clear intent to ensure the law's narrow exceptions to disclosure would not create secret regulations on public conduct. The Senate committee explained that the law's purpose was to

> establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongly withheld. . . . It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.

S. Rep. No. 813, 89th Cong., 1st Sess. (1965). The House committee provided further context for the impetus to revise the federal disclosure law:

> As the Federal Government has extended its activities to solve the Nation's expanding problems—and particularly in the 20 years since the Administrative Procedure Act was established—the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160 [the bill that eventually became the FOIA].

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).

Thus, the FOIA's legislative history clearly reflects the intent of Congress to prevent the creation of secret, unreviewable agency regulations on public conduct.

2. FOIA's Affirmative Disclosure Requirements and Judicial Precedent Recognize Congress' Intention Not to Permit the Shielding of Secret Law From the Public.

In the four decades since the FOIA's enactment, this Court and others have repeatedly recognized that a fundamental purpose of the statute is to prohibit agencies from maintaining secret requirements with which the public must comply. Put bluntly, "[o]ne of the principal purposes of the Freedom of Information Act is to eliminate 'secret law.'" *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 781 (D.C. Cir. 1978) (en banc) (Bazelon, J., concurring).

As an initial matter, the judiciary has noted that the affirmative obligations the FOIA places on agencies weighs against secret law. The Act requires agencies to index "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2). As this Court has found, these requirements demonstrate "a strong

congressional aversion to secret (agency) law," as well as "an affirmative congressional purpose to require disclosure of documents which has the force and effect of law." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967) and H.R. Rep. No. 1497) (internal citations and quotation marks omitted). *See also Reporters Comm. For Freedom of the Press*, 489 U.S. at 772 n.20 (The FOIA's "indexing and reading-room rules indicate the primary objective is the elimination of 'secret law.'") (quoting Easterbrook, *Privacy, supra*, at 777.)

Furthermore, the courts have repeatedly noted Congress' aversion to secret law in analyses of two of the FOIA's exemptions to the law's broad disclosure requirement: Exemptions 2 and 5.

Exemption 2 of the FOIA exempts from disclosure agency records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552a(b)(2). This Court has established that Exemption 2 may be used to withhold intra-agency records in which the public could not be expected to have any significant interest, *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 369-70 (1976), as well as parts of law enforcement manuals where disclosure could be expected to risk the circumvention of laws or agency regulations. *Crooker v. BATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981).[2]

---

[2] It is worth underscoring that TSA's identification requirement has not been imposed for criminal investigation purposes. Rather, "the suspicionless screening of passengers *boarding* airplanes is based on . . . the *administrative search* doctrine. Under this exception [to full Fourth Amendment requirements], searches are conducted as part of a regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence, but must still be reasonable under the Fourth Amendment." Congressional Research Service, RL31826, *Protecting Our Perimeter: "Border Searches" Under the Fourth Amendment* 7 (Aug. 15, 2006) (citing *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (emphases in original).

The courts have declared again and again, however, that Exemption 2 may not be used to withhold "secret law" from the public. "All administrative materials, even if included in staff manuals that otherwise concern law enforcement, must be disclosed unless they come under one of the other exemptions of the act. Such materials contain the 'secret law' which was the primary target of the act's broad disclosure provisions." *Hardy v. BATF*, 631 F.2d 653, 657 (9th Cir. 1980) (citing *Cox v. U.S. Dep't of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1976)). Information cannot be properly withheld under Exemption 2 when it "purport[s] to regulate activities among members of the public [or] set[s] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox*, 601 F.2d at 5; *see also Crooker*, 670 F.2d at 1075; *Wiesenfelder v. U.S. Dep't of Education*, 959 F. Supp. 532, 535 (D.D.C. 1997); *Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 602 F. Supp. 469, 474 (D.D.C. 1984).

Likewise, a strong preference against secret law has been read by courts into Exemption 5 of the FOIA, which protects "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." 5 U.S.C. § 552a(b)(5). This exemption includes a deliberative process privilege, which protects from public disclosure "materials which are both predecisional and deliberative." *Mink*, 410 U.S. at 88; *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997); *Wolfe v. U.S. Dep't of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). Just a few years after the FOIA was first passed, the D.C. Circuit unequivocally declared that the deliberative process privilege could *not* be asserted to protect materials that directly govern the public's conduct: "These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public." *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971).

Courts have continued to apply this fundamental principle in subsequent cases. As the D.C. Circuit has stressed:

> [A] major limitation on the exemption for internal memoranda is that they are not protected, even though they are deliberative rather than factual, if they represent policies, statements or interpretations of law that the agency has actually adopted. The purpose of this limitation is to prevent bodies of "secret law" from being built up and applied by government agencies. The policy basis for this exemption is derived from a perceived need not to frustrate the explicit commands of the statute that "final opinions . . . and . . . orders," "statements of policy" and "instructions to staff" be accessible to the public.

Schwartz v. IRS, 511 F.2d 1303, 1305-06 (D.C. Cir. 1975) (citing *Sterling Drug*, 450 F.2d at 698, and 5 U.S.C. § 552a(a)(1) & (2)). Over the decades, the prohibition against "secret law" has become well established in FOIA case law.

> A strong theme of our [deliberative process] opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as "formal," "binding" or "final."

Coastal States Gas Corp. v. U.S. Dep't of Energy, 617 F.2d 854 (D.C. Cir. 1980); *Tax Analysts*, 117 F.3d at 616.

The FOIA does contain an exemption for materials "specifically exempted from disclosure by statute," 5 U.S.C. § 552a(b)(3), and Congress has permitted TSA to shield certain "security activities" from disclosure under the FOIA, 49 U.S.C.

§ 114(s). However, agency regulations on public behavior are not the type of information Congress meant to preclude from public scrutiny, as the legislative history and judicial interpretation of the FOIA show. The Court must not permit this exemption to swallow a central purpose of the statute: to provide an oversight mechanism for the government's actions. As this Court recently observed, FOIA is "a means for citizens to know 'what the Government is up to.' This phrase should not be dismissed as a convenient formalism. *It defines a structural necessity in a real democracy.*" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (citations omitted) (emphasis added).

Thus, the Court should grant *certiorari* to review the propriety of the government's SSI designation in this case.

B. This Court Should Ensure that TSA Does Not Abuse Its Authority to Designate "Sensitive Security Information" to Impose Secret Laws Upon the Public.

This Court should examine whether the government's identification requirement is properly designated as SSI and thus rightfully shielded from public review. While Congress has given TSA discretion to designate SSI, the agency has promulgated regulations in recent years suggesting that it has unfettered discretion to keep virtually anything from the public merely by labeling it SSI. Courts have determined that this authority has been applied in an overly broad manner, and the Congressional Research Service ("CRS") has reported that TSA has used the SSI designation in controversial ways. This Court must not permit TSA to use the SSI label to impose secret laws upon the pubic. If the Court permits this sort of administrative lawmaking, other agencies will follow TSA's lead and create secret laws to govern the public's conduct. For this reason, it is critical that the Court exercise its authority here to review the propriety of the agency's SSI designation as applied to the identification requirement.

1. TSA's Authority to Conceal Information as SSI is Overly Broad and Invites Capricious Application, Which Congress Has Recently Recognized.

In recent years, the government has developed new policies to keep certain types of unclassified information from the public. "Government secrecy continues to expand across a broad array of agencies and actions, including military procurement, new private inventions, and the scientific and technical advice that the government receives." OpenTheGovernment.org, *Secrecy Report Card 2006* at 2 (2006). According to an official within the Office of the Director of National Intelligence, more than 60 unique designations are used throughout the government to label information sensitive but unclassified, thus keeping it from public review. *Building on the Information Sharing Environment: Addressing Challenges of Implementation: Hearing of House Comm. on Homeland Security Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment,* 109th Cong. (2006) (testimony of Thomas E. McNamara, Program Manager, Office of the Director of National Intelligence).

Troublingly, there is little institutional oversight of administrative use of these designations:

> The picture that emerges from the diverse [sensitive but unclassified] policies . . . shows little likelihood that Congress or the public will be able to assess whether these policies are being used effectively to safeguard the security of the American public, or abused for administrative convenience or for improper secrecy. Unlike classified records or ordinary agency records subject to FOIA, there is no monitoring on the use or impact of protective sensitive unclassified information markings.

The National Security Archive, *Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information* i (March 2006).

Because administrative agencies apply these secrecy labels with little or no accountability, it is critical that this Court ensure these designations are not used to undermine the fundamental principles of the FOIA and impose secret law upon the public.

The concept of SSI originated with the Air Transport Security Act of 1974, which authorized the Federal Aviation Administration ("FAA") to withhold certain information from the public. Pub. L. No. 93-366 § 316, 88 Stat. 409 (1974). The narrow language of this law permitted the FAA to:

> Prohibit disclosure of any information obtained or developed in the conduct of research and development activities . . . if in the opinion of the Administrator the disclosure of such information—(A) would constitute an unwarranted invasion of personal privacy . . . (B) would reveal trade secrets or privileged or confidential commercial or financial information obtained by any person; or (C) *would be detrimental to the safety of persons traveling in air transportation.*

Id. (emphasis added). The FAA implemented these requirements by promulgating regulations that, *inter alia*, established the SSI designation, which in 1997 was defined as "records and information . . . obtained or developed during security activities or research and development activities." 14 C.F.R. § 191.1 (1997); Congressional Research Service, RL32664, *Interstate Travel: Constitutional Challenges to the Identification Requirement and Other Transportation Security Regulations* 2 (2004). The SSI designation applied at that time

to air transportation entities and personnel. Congressional Research Service, *Interstate Travel* at 2.

In 2002, the Aviation and Transportation Security Act created TSA within the Department of Transportation ("DOT"), and transferred authority for designating SSI, among other responsibilities, to the TSA. Pub. L. No. 107-71 § 101(e)(3), 115 Stat. 597, 603 (2002). The law also broadened the definition of SSI to include information about other forms of transportation. *Id.* Later that year, the Homeland Security Act of 2002 transferred TSA from the DOT to the Department of Homeland Security ("DHS"). Pub. L. No. 107-296-116 Stat. 2312. This law delegated to TSA authority to:

> Prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) *be detrimental to the security of transportation.*

Id. at § 1601(b) (codified as amended at 49 U.S.C. § 114(s) (2004)) (emphasis added).[3]

In May 2004, TSA and DHS published a Federal Register notice listing sixteen distinct types of information that may be labeled SSI under the Homeland Security Act, including such broad categories as material that might "be detrimental to transportation safety"; "Security Directives," along with "[a]ny

[3] A similar statutory provision applying to DHS's Secretary of Transportation authorizes nondisclosure of information that is "obtained or developed in ensuring [transportation] security." 49 U.S.C. § 40119(b)(1).

comments, instructions, and implementing guidance pertaining thereto"; and the catch-all "any information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of [the DOT] determines is SSI under 49 U.S.C. 40119." 69 Fed. Reg. 28066, 28082-83 (codified at 49 C.F.R. § 1520.5).

2. TSA Has Used the SSI Designation to Avoid Releasing Harmless or Already Public Information.

According to a report by CRS, the SSI regulations at issue here "are intended to reduce the risk of vital security information reaching the wrong hands and resulting in another terrorist attack." RS21727, *Sensitive Security Information (SSI) and Transportation Security: Background and Controversies* 3 (2004). Courts have found, however, that TSA applied these regulations in an overbroad manner to avoid releasing innocuous or already public information.

In 2004, Judge Charles R. Breyer of the Northern District of California performed an *in camera* review of material withheld by the government when a FOIA requester challenged, *inter alia*, TSA's designation of information about the agency's "no-fly" watch list as related to a security directive under its SSI regulations. *Gordon v. FBI*, 390 F. Supp. 2d 897, 899-900 (N.D. Cal. 2004). Judge Breyer determined that TSA did not meet its burden of showing that certain information was properly withheld "by simply reciting" that it was SSI. *Id.* In fact, the court found, TSA relied upon "frivolous claims of exemption" to withhold "innocuous information" that was "common sense and widely known." *Id.*

Since then, the district court for the District of Columbia has similarly found an unsupported SSI designation legally inadequate to support withholding of information under the FOIA. *See Electronic Privacy Information Center v. Dep't of Homeland Security*, 384 F. Supp. 2d 100, 110 (D.D.C. 2005)

(rejecting TSA's mere statement that a document constitutes SSI, and finding that the government must "provide a more adequate description in order to justify the application of [Exemption 3] to the withheld material.").

In addition to these judicial determinations, at least one FOIA request shows that TSA made arbitrary withholdings of information under the SSI regulations. In this instance, TSA refused to release information labeled SSI in a response to a FOIA request from the National Security Archive, despite the fact that the information had been disclosed to the public in the final report of the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission"). Press Release, National Security Archive, Government Censors Aviation Warnings Leading Up to 9/11 (Nov. 14, 2004).[4] Specifically, TSA used the SSI designation to keep secret the titles and texts of five aviation warnings, also known as Information Circulars, that had been transmitted to airlines shortly before the attacks. *Id.* However, the titles and information in the warnings had already been published in the 9/11 Commission report, which was at one time the bestselling book in the United States. *Id.* When the National Security Archive appealed the withholdings, TSA finally released the information. National Press Release, Security Archive, 9/11 Commission Staff Report on FAA Failings Published on Web (Feb. 10, 2005).[5]

3. The SSI Designation May Conceal Security Flaws or Illegal Activity, Undermine the Justice System, and Create Confusion.

In addition to these documented uses of the SSI regulations to withhold information that should have rightfully been released to the public, the CRS has reported at length that the designation has "raised a number of concerns about the management of [SSI] information and the accountability of

---

[4] http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB137/index.htm.

[5] http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB148/index.htm.

governmental agencies." CRS, *Sensitive Security Information* at 3.

In one instance identified by the CRS, the SSI label was controversially applied to conceal information related to an incident in which a baggage screener permitted a passenger to clear security after a test indicated his luggage might contain an explosive. *Id.* The lack of public information about this incident made it impossible to understand how this security breach occurred or might be avoided in the future, and ultimately undermines public faith in the reliability of airport security measures.

The government has also applied the SSI designation in a manner that undermined the criminal justice system. The CRS reported that TSA's assertion of the SSI label may have negatively impacted the criminal prosecution of a baggage screener who allegedly stole items from passenger baggage. *Id.* at 3-4. The U.S. attorney prosecuting the case ultimately dropped the charges when a court ruled that the baggage screener's attorneys would be permitted to cross-examine the government's witnesses, which the government determined "could raise the possibility of disclosing SSI about TSA's security and training procedures." *Id.* at 4. This incident may have discouraged future prosecutions against TSA employees accused of criminal activity that could potentially concern SSI. The government's SSI claims have made it impossible for plaintiffs to pursue recourse in the civil context, as well, as this case demonstrates). In civil cases, as in the criminal prosecution discussed *supra*, concerns about disclosing SSI undermine the ability of the courts to render justice.

According to the CRS, another divisive use of SSI involved the execution of security agreements between TSA, airports, and local law enforcement that prohibited police from publicly commenting, without the approval of TSA officials, on incidents occurring on airport property that involved SSI. *Id.* at 5. A police chief in Iowa expressed concern that these

agreements might bar the police from reporting arrests for minor incidents at airports or even presenting testimony in court without the prior approval of TSA. *Id.* (citing Tom Alex, "Secrecy in Airport Security Contract Criticized," *Des Moines Register*, Sept. 27, 2003, at 1A). Upon the request of Iowa's senators, TSA explained that the agreements were not intended to impose a "gag order" on police, and also clarified that law enforcement officers did not require TSA approval to testify in court about matters not involving sensitive information. CRS, *Sensitive Security Information* at 5-6. TSA also ultimately agreed to make copies of the agreement publicly available, with redactions for SSI. *Id.* at 6. This incident illustrates, however, that the SSI designation can easily create confusion about the measures those with a "need to know" are expected to take to conceal SSI from the public. Such confusion may lead officials to exercise an abundance of caution, and keep more information secret than necessary.

This Court should not allow TSA to use the SSI designation to govern the public's conduct through secret laws. As one open government authority has noted, there are "real costs associated with keeping unnecessary secrets." Fuchs, *Judging Secrets*, 58 ADMIN. L. REV. at 136. These costs include "undermining the legitimacy of government actions, reducing accountability, hindering critical technological and scientific progress, interfering with the efficiency of the marketplace, and breeding paranoia." *Id.* at 136-137. It is clear that the SSI designation has raised many of these concerns in the context of the identification requirement. For this reason, it is critical that the Court carefully examine TSA's application of the SSI label here to ensure that it has not been used to impose secret law upon the public.

CONCLUSION

For the forgoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

David L. Sobel
Counsel of Record
Marcia Hofmann
ELECTRONIC FRONTIER FOUNDATION
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
(202) 797-9009

Cindy Cohn
Lee Tien
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell St.
San Francisco, CA 94110
(415) 436-9333

November 2006

Counsel for Amici

FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-211

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MARC ROTENBERG
Counsel of Record
SHERWIN SIY
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009
(202) 483-1140

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE..... .1

ARGUMENT 2

I. The Identification Directive Creates A Secret Law Applicable to the General Public, Which Violates Due Process 2

II. Laws Withheld from the Public Require Even Stricter Scrutiny than Vague Laws 6

A. The Directive's Secrecy Denies Individuals a Reasonable Opportunity to Comply with the Law 6

B. The Directive's Secrecy Prevents Meaningful Review and Allows for Arbitrary Enforcement. 9

III. The Security Directive Containing an Identification Requirement is Void for Vagueness..... 11

A. Case Law Does Not Limit Application of the Void-for-Vagueness Doctrine to Penal Statutes 12

B. John Gilmore Did Not Have Actual Notice of the TSA Security Directive 14

C. Even if the TSA Security Directive Articulates a Clear Standard, That Standard is Unknown to the Parties Charged with Its Enforcement.....15

IV. Withholding the Text of the Directive From Those it Regulates is Contrary to the Statutory Intent of the Aviation and Transportation Security Act 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Bankers Life & Casualty v. Crenshaw, 486 U.S. 71, 87 (1988)..... 14

Chowdhury v. Northwest Airlines Corp., 226 F.R.D. 608, 610 n.1 (N.D. Cal. 2004)..... 3

Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966)..... 13

Gilmore v. Gonzales, 435 F.3d 1125 (9th Cir. 2006) passim

Gordon v. FBI, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004) 3

Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) 9

Hardy v. Bureau of Alcohol, Tobacco, and Firearms, 631 F.2d 653, 657 (9th Cir. 1980). 5

Kolender v. Lawson, 461 U.S. 352, 357 (1983) 10, 12. 13

New York Times v. Sullivan, 403 U.S. 713, 724 (1971) 2

Public Citizen v. FAA, 988 F. 2d 186, 188-89, 193 (D.C. Cir. 1993) 3-4

Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) ... 4

Winters v. New York, 333 U.S. 507 (1948) 13

Statutes and Regulations:

Aviation and Transportation Security Act (2001) 16

49 U.S.C. § 114(s)(1) 3. 16, 17

49 C.F.R. §1520.5 16

49 C.F.R. §1520.5(b)(5) (vulnerability assessments)..... 17

49 C.F.R. §1520.5(b)(6)(i)) (details of inspections revealing vulnerabilities) 17

49 C.F.R. §1520.5(b)(7) (threat information) 17

49 C.F.R. §1520.5(b)(9) (information regarding screening equipment) 17

49 C.F.R. § 1520.303 16

S. Rep. No. 89-813 (1966)..... 3

Other Authority:

THE FEDERALIST No. 49 1

Bureau of Labor Statistics, *U.S. Department of Labor, Occupational Employment Statistics, Reservation and Transportation Ticket Agents and Travel Clerks,* May 24, 2006 12

FRANZ KAFKA, THE TRIAL (1925). 15

Harold C. Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97, 97 (1988) 2

INTEREST OF AMICUS CURIAE[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as amicus curiae in several privacy cases before this Court, including *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*; 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); and *Reno v. Condon*, 528 U.S. 141 (2000). EPIC has also participated in this case as amicus before the Ninth Circuit.

Unpublished, secret laws undermine the very essence of self-government. Central to the American form of government has been a longstanding commitment to public trials and to openness in government decisionmaking.[2] "Publication of the law militates against the plea of ignorance, provides a practical

---

[1] This brief *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for Petitioner and Respondent have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Law school students participating in the EPIC Internet Public Interest Opportunities Program (IPIOP) Courtney Anne Barclay and Jay Tamboli assisted in the preparation of this brief.

[2] *See, e.g.*, THE FEDERALIST No. 49 (James Madison).

refutation of such a defense, and otherwise constitutes a foundation stone of the self-government edifice."[3]

In this case, the government refuses to disclose the text of a regulation compelling air travelers to present identification. A generally applicable law or regulation that is not disclosed to the public it regulates violates due process, creating the potential for uncertainty and abuse of discretion. Such a regulation is also void for vagueness. Furthermore, the Transportation Security Administration's classification of the regulation as "sensitive security information" is counter to, and fails to serve the purposes of, the law that authorizes such classification.

ARGUMENT

I. The Identification Directive Creates A Secret Law Applicable to the General Public, Which Violates Due Process

The secret identification directive acts as a legal obligation that directly affects millions of travelers while providing no public notice or allowing for the traditional checks on arbitrary or prejudicial enforcement. Secret law has long been anathema to the government,[4] with statutes such as the Freedom of Information Act and the Federal Register Act designed to combat this very problem. In enacting the Freedom of Information Act, for example, Congress intended to "establish a general philosophy of full

---

[3] Harold C. Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97, 97 (1988).

[4] "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors." *New York Times v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

agency disclosure" since "[a] government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."[5]

Many of the well-understood problems of secret law are present in the case at hand. The TSA Security Directive ("TSA Directive") is an order that regulates the conduct of anyone who needs or plans to commute by commercial airline, and is therefore an agency regulation that, in the absence of public disclosure, violates constitutional due process. Under 49 U.S.C. § 114(s), the TSA may develop regulations "prohibiting the disclosure of information obtained or developed in carrying out security" if disclosing the information would "be detrimental to the security of [air] transportation."[6] The 2002 Homeland Security Act further expanded this agency authority to withhold information on the grounds that its disclosure would be detrimental to the safety of people engaging in general transportation.[7]

In *Public Citizen, Inc. v. FAA*, the D.C. Circuit determined that Congress intended that the FAA (and by extension, the TSA) have authority to promulgate secret rules that are security-sensitive pursuant to 49 U.S.C. app. § 1357(d)(2), which has since been amended and recodified at 49 U.S.C. § 40119 (b)(1).[8] In the notice of proposed rulemaking on minimal staffing levels and minimal training requirements for new employees, the FAA withheld

---

[5] S. Rep. No. 89-813 (1966).

[6] *Gordon v. FBI*, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004); *see also Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 193 (D.C. Cir. 1993).

[7] *See Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 610 n.1 (N.D. Cal. 2004).

[8] 988 F.2d at 188-89.

instructions tailored to the particular needs of each airport and air carrier. The FAA claimed that secrecy of the staffing and training instructions was necessary to maintain the integrity of airport security procedures. The D.C. Circuit rejected the plaintiff's argument that the secret rules violated the notice-and-comment and publication requirements of the Administrative Procedures Act, and the Freedom of Information Act respectively.

There is a pivotal difference between the agency rules at issue in *Public Citizen* and *Gilmore*. While *Public Citizen*'s secret rule impacts internal agency practices, *Gilmore*'s rule stretches beyond the agency to regulate the conduct of anyone who has or who could potentially travel by commercial airlines.[9] The Ninth Circuit agreed that the Directive 'imposes an obligation' by requiring airline passengers to present identification or be a 'selectee' . . ."[10] However, the Ninth Circuit used commercial-centric language, such as the TSA Directive having a "'direct and immediate' effect on the daily business of the party asserting wrongdoing [the airline]" and that "aircraft operators . . . are required to maintain approved security programs [that] must comply with each Security Directive issued to the aircraft operator by the TSA . . ."[11] This indicates that the Ninth Circuit incorrectly construed the TSA Directive as primarily regulating airline businesses.

---

[9] *Cf. Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (explaining that material that was "designed to establish rules and practices for agency personnel and . . . involved no 'secret law' of the agency" could be withheld).

[10] *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006).

[11] *Gilmore*, 435 F.3d at 1133.

The TSA Directive is properly considered a "secret law," which *Hardy v. Bureau of Alcohol, Tobacco, and Firearms* defines as "information withheld from the public which defines the legal standards by which the public's conduct is regulated."[12] Through orders issued to airlines to implement identification programs, the TSA Directive regulates the conduct of the general public – which is comprised of people who currently travel by commercial flight, as well as those who could contemplate travel in such a manner. The Ninth Circuit suggested that "those who, like Gilmore, refuse to comply with the identification policy"[13] are likely to pursue other options, such as traveling by train or driving, to exercise their right to interstate travel. Put plainly, the Ninth Circuit recognized that the TSA Directive creates a strong disincentive for the public to use the most common form of modern cross-country travel – commercial flight – and that the public will modify their behavior when faced with this secret rule. A secret rule that creates such substantial deterrents to a routine public activity and that forces people to modify their behavior by either complying with its terms or seeking alternate routes (in the present or future) is a regulation of public conduct. The rule deters individuals who are concerned about surrendering their identification or surrendering their body and belongings to an extensive and invasive search from attempting air travel again, since they will not know what liberties are permitted under the terms of the regulation.

---

[12] *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980).
[13] *Gilmore*, 435 F.3d at 1133.

Agency rules that coerce actions of the public and that are not published, are inconsistent with due process. Due process is violated even where disclosure of such rules would adversely affect transportation safety. Thus, withholding information about the TSA Directive – information that defines the legal standards by which the public is regulated – raises due process concerns.

II. Laws Withheld from the Public Require Even Stricter Scrutiny than Vague Laws

The same values that are offended by vague laws are violated to an even greater extent by laws that are hidden from the public. In either case, members of the public are denied both a reasonable opportunity to comply with the law, and the assurance that they will not be subject to arbitrary or discriminatory enforcement of the laws. However, in the case of a vague law, the public has at least the ability to examine the language of the statute and make its case to the judiciary that the language does not pass constitutional muster. The individual can likewise compare the language of the statute to its application in her particular case. An individual cannot adequately challenge a law invisible to public oversight if he cannot ever read that law himself and present to a fact-finder how it has been misapplied. Even if a court can review the language *in camera*, only one party to the suit is capable of presenting its case in an adversarial setting. Because of these considerations, a law withheld from public scrutiny that impacts millions of Americans should not be permitted.

A. The Directive's Secrecy Denies Individuals a Reasonable Opportunity to Comply with the Law

In order to satisfy due process, a law must be sufficiently clear to provide individuals with a reasonable opportunity to comply with the law. Airline personnel gave directly contradictory statements about the secret TSA Directive at each encounter with Gilmore.

> On July 4, 2002 . . . [Gilmore] attempted to fly from Oakland International Airport to Baltimore-Washington International Airport on a Southwest Airlines flight . . . .
> [T]he [Southwest ticket counter] clerk informed Gilmore that identification was required . . . . Gilmore asked whether the requirement was a government or Southwest rule, and whether there was any way that he could board the plane without presenting his identification. The clerk was unsure, but posited that the rule was an "FAA security requirement." The clerk informed Gilmore that he could opt to be screened at the gate in lieu of presenting the requisite identification . . . . At the gate, Gilmore again refused to show identification. In response to his question about the source of the identification rule, a Southwest employee stated that it was a government law. Gilmore then met with a Southwest customer service supervisor, who told him that the identification requirement was an airline policy . . . .
>
> That same day, Gilmore went to San Francisco International Airport and attempted to buy a ticket for a United Airlines flight to Washington, D.C. While at the ticket counter, Gilmore saw a sign that read: "PASSENGERS MUST PRESENT

> IDENTIFICATION UPON INITIAL CHECK-IN" . . . . The [ticket counter] agent told him that he had to show identification at the ticket counter, security checkpoint, and before boarding; and that there was no way to circumvent the identification policy. A United Airlines Service Director told Gilmore that a United traveler without identification is subject to secondary screening, but did not disclose the source of the identification policy. United's Ground Security Chief reiterated the need for identification, but also did not cite the source of the policy. The Security Chief informed Gilmore that he could fly without presenting identification by undergoing a more intensive search . . . [that] include[d] walking through a magnetometer, being subjected to a handheld magnetometer scan, having a light body patdown, removing [his] shoes, and having [his] carry-on baggage searched by hand and a CAT-scan machine . . . .[14]

In other words, Gilmore was informed that there was a rule which might be either a government rule or an airline policy; which either did or did not require him to show identification – which was required either at the check-in counter, at the gate, at a security checkpoint, or at some combination of those locations; and which either did or did not give him the option to choose a secondary screening search instead. Contrary to the Ninth Circuit's assertion,

---

[14] *Gilmore*, 435 F.3d at 1130.

notice to the public as to what conduct was required, and by whom, was defective.[15]

B. The Directive's Secrecy Prevents Meaningful Review and Allows for Arbitrary Enforcement

The secrecy shrouding the TSA Directive shields responsible parties from being held accountable for the effects of the regulation on members of the public. Courts have a clear role in providing meaningful judicial review of executive action, and a functional checks-and-balance system requires more than agency assertions of legality and due process. This Court recognized in *Hamdi v. Rumsfeld* that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."[16] Meaningful judicial review is necessary even in an era of international conflict and sustained threats to national security – for how is one to seek redress for improperly applied regulations if one cannot have the restrictions imposed independently reviewed?

After conducting an *in camera* examination of the Directive, the Ninth Circuit concluded that because "the Directive articulates clear standards . . . [and] notifies airline security personnel of the identification requirement and gives them detailed instructions on how to implement the policy[,] . . . [and] because all passengers must comply with the identification policy, the policy does not raise concerns of arbitrary application."[17] However, even if the instructions are

---

[15] *Gilmore*, 435 F.3d at 1153.
[16] 542 U.S. 507, 530 (2004).
[17] *Gilmore*, 435 F.3d at 1136.

clear, their application may not be. The problems of arbitrary enforcement are not found in the potential confusion of law enforcement, but in the threat that law enforcement may abuse its powers behind the shield of a law: "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a 'standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[18] Whether the pretext for an officer's predilections rests in the possible interpretations of a vague statute, or within a set of regulations that an individual cannot view in order to challenge its application, the harm is still present.

Discrepancies in the implementation of the identification policy are likely to exist in spite of detailed instructions. The customized nature of the TSA orders (tailored to address the needs of each airport and air carrier) means that implementation procedures already vary. Compounded with the multiple possible interpretations of words used in the instructions in the orders, the application of the identification policy will be anything but uniform as applied to all airports and air carriers. This is exacerbated by the fact that the Directive is enforced not only by numerous public employees and law enforcement in their official capacities, but also by private airline employees numbering in the hundreds of thousands.[19] The secrecy attached to the

---

[18] *Kolender v. Lawson, 461 U.S. 352, 357 (1983).* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

[19] According to the U.S. Department of Labor's Bureau of Labor Statistics, there were over 160, 000 workers in these jobs in 2005. *See* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Employment Statistics, *Reservation and*

orders frustrates the individual's attempt to differentiate between whether his liberties are being compromised by improper or arbitrary implementation of the TSA orders or by valid regulation, and to seek redress accordingly.

Multiple interpretations of the policy are not purely theoretical, either. As noted above, Gilmore received multiple contradictory statements as to what was required and permitted under the policy. Assuming that the policy allows any traveler to forgo providing identification in lieu of selectee screening, for instance, an agent refusing this option to all members of a minority race, for instance, would come under no scrutiny by the public, or the courts. So long as individuals are unable to view the policy, no one individual subject to arbitrary, prejudicial, or biased enforcement of the Directive would be able to tell if she was afforded disparate treatment.

III. The Security Directive Containing an Identification Requirement is Void for Vagueness

The Ninth Circuit rejected Gilmore's vagueness challenge on three grounds: (1) the TSA Directive does not impose any criminal sanctions; (2) Gilmore had actual notice of the TSA Directive; and (3) the TSA Directive articulates clear standards. However, case law does not completely limit application of the void-for-vagueness doctrine to penal statutes; Gilmore did not have actual notice of the TSA Directive; and although the TSA Directive might articulate a

---

Transportation Ticket Agents and Travel Clerks, May 24, 2006, http://www.bls.gov/oes/current/oes434181.htm.

clear standard, that standard is unknown to the parties charged with enforcement.

A. Case Law Does Not Limit Application of the Void-for-Vagueness Doctrine to Penal Statutes

Although John Gilmore was penalized for non-compliance with the TSA Directive, the Ninth Circuit decided that because his penalty "simply prevents... [him] from boarding commercial flights" the void-for-vagueness doctrine did not apply.[20] The Ninth Circuit reached this decision by considering and distinguishing only one aspect of one of several cases presented by the plaintiff in support of vagueness.[21] Thus, this determination was based on an incomplete analysis of case law.

In his opening brief to the Ninth Circuit, Gilmore argues that the TSA Directive violates the Due Process clause of the U.S. Constitution because the unpublished nature of the TSA Security Directive renders it overly vague.[22] To support his argument, Gilmore cites *Kolender*, a case in which the Court held that a California statute was unconstitutional because the law was not drafted with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[23] The Ninth Circuit, however, dismissed the argument stating, "the

---

[20] *Gilmore*, 435 F.3d at 1135.

[21] *Id.*

[22] Brief of Petitioner-Appellant at 40, *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), *available at* http://papersplease.org/gilmore/_dl/Gilmore%20v.%20Ashcroft%208.16.04.pdf.

[23] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Supreme Court stated that this doctrine 'requires that a *penal statute* define the criminal offense with sufficient definiteness that....'"[24] The Ninth Circuit added emphasis to "penal statute" and used that phrase to differentiate *Kolender* from Gilmore's claim.[25]

This differentiation, however, is erroneous. In the *Kolender* decision, Justice O'Connor summarized the Court's vagueness jurisprudence as permitting "a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct'" adding "where a statute imposes criminal penalties, the standard of certainty is higher."[26] The *Kolender* decision does not require a challenge to a criminal statute; in fact the *Kolender* decision recognizes the possibility of a vagueness challenge to a non-criminal regulation, rule, or order as Gilmore has done here.

In addition to *Kolender*, Gilmore cited *Hoffman Estates v. Flipside*, which dealt with a licensing ordinance that the Court described only as "quasi-criminal."[27] This Court has also applied the void-for-vagueness doctrine in a number of cases where civil penalties were at issue.[28]

---

[24] *Gilmore*, 435 F.3d at 1135 (citing *Kolender*, 461 U.S. at 357 (emphasis added in *Gilmore*)).

[25] *Id.*

[26] *Kolender*, 461 U.S. at 358 n.8 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) and *Winters v. New York*, 333 U.S. 507 (1948)). In a void-for-vagueness claim, a differentiation between penal and civil statutes only impacts the standard by which a facial review is conducted. *Id.* Thus, while slightly more vagueness might be allowed in a civil, rather than criminal statute, civil statutes must still be reviewed for vagueness and voided if they are too indefinite.

[27] 455 U.S. 489, 499 (1982).

[28] *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (concerning assessment of fees against a defendant) ("So here this

B. John Gilmore Did Not Have Actual Notice of the TSA Directive

John Gilmore cannot be said to have actual notice of the TSA Directive. At best, Gilmore was given incomplete notice of a regulation, rule, or order with a reference that the requirement was either a "government law" or "airline policy."[29] The Ninth Circuit determined that Gilmore had actual notice because several airline personnel informed him of an identification policy required to board the plane.[30] In addition, the Ninth Circuit found that a sign in front of a ticket counter was sufficient notice of the TSA Directive to constitute notice to Gilmore.[31] However, this determination by the Ninth Circuit is based on an incomplete analysis of the facts. As seen above, Gilmore was given a number of differing statements of the rule, including the source of the directive, the location at which he had to present identification, and what alternatives were available to the identification policy.

Gilmore might have had some notice of an identification and/or search requirement, but the various interpretations and sources of the requirement cannot be construed to constitute actual notice. The Ninth Circuit's conclusion that Gilmore had adequate notice is based on an incomplete factual analysis.

---

state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague."); *see also Bankers Life & Casualty v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J, with Scalia,, J., concurring) (applying the doctrine to punitive damages).

[29] *Gilmore*, 435 F.3d at 1130.

[30] *Id.* at 1135.

[31] *Id.* at 1136.

C. Even if the TSA Directive Articulates a Clear Standard, That Standard is Unknown to the Parties Charged with Its Enforcement

It is clear from the Ninth Circuit opinion that there exists a TSA Directive requiring a traveler to present government-issued identification before entering the gate area of an airport or boarding a plane.[32] However, it is also clear based on John Gilmore's experience that the airline agents charged with enforcement are either unaware of the standards set forth in the TSA Directive or were deliberately misleading Gilmore as to the specifics of that Directive.

The Ninth Circuit determined after its in camera review of the TSA Directive that the Directive "provides a 'definitive statement' of TSA's position by detailing the policy and the procedures."[33] However, in practice, the policy and procedures are not definitive and are applied in an unexpected and inconsistent manner. Many of those individuals charged with enforcing the policy could not even accurately state its terms. For this reason, it is clear that this undisclosed law enforced against the general public cannot survive a void-for-vagueness claim.

Unless the secrecy masking this rule is lifted, we risk living in an increasingly Kafka-esque world, where "[i]t is not necessary to accept everything as true, [but rather] one must only accept it as necessary."[34]

---

[32] *Id.* at 1133.

[33] *Id.*

[34] FRANZ KAFKA, THE TRIAL (1925).

IV. Withholding the Text of the Directive From Those it Regulates is Contrary to the Statutory Intent of the Aviation and Transportation Security Act

The identification requirement is withheld from Gilmore and the public because of its classification as "sensitive security information" ("SSI"). Under the Aviation and Transportation Security Act, the TSA is authorized to withhold from public disclosure if "the Under Secretary decides that disclosing the information would--(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential information or financial information; or (C) be detrimental to the security of transportation."[35] Regulations promulgated by TSA under this statute withhold a broad range of information, including not only the categories of information specified by statute, but also adding several new ones.[36] The added categories include security directives issued under 49 C.F.R. § 1542.303. Not only does this inclusion expand the definition of SSI beyond its original statutory boundaries, withholding the identification requirement fails to meet any of the stated statutory requirements for information to be classified as SSI.

Revealing the text of the directive that requires passengers to present identification obviously does not disclose either private information, nor does it reveal trade secrets. Nor, notably, is it at all detrimental to the security of transportation. As the Ninth Circuit noted, the essentials of the requirement are known to all--that passengers must

---

[35] 49 U.S.C. § 114(s)(1).
[36] 49 C.F.R. § 1520.5.

display identification.[37] In fact, it is fully necessary for the public to be aware of this demand. Allowing the public to see the specific text that authorizes the requirement does not reveal any of the sensitive information contemplated actually listed by TSA in its regulations.[38]

Nor would revealing the policy provide potential terrorists with the means to circumvent it. According to the Ninth Circuit's *in camera* review, the directive applies to all travelers, giving a potential malefactor no way to game the system, even should the text of the directive, like all generally applicable laws, be available to the public.[39]

The Ninth Circuit gives no reason for the requirement's classification as SSI, other than the agency's sole determination that, as a Security Directive, the requirement should be unseen by the public. Nowhere is there an indication that the government shown how the directive's secrecy at all promotes safety, or how its publication would be detrimental to security. With no obligation to provide even a rudimentary justification, any particular information stylized as a "security directive" could evade public notice and comment, and restrict any potential challenge to its validity or secret status to an *in camera* review at the appellate level. Such a precedent would grant the TSA an impermissible amount of discretion in what it can

---

[37] *Gilmore*, 435 F.3d at 1153.

[38] More likely candidates for information that, if revealed, might harm security include vulnerability assessments (49 C.F.R. §1520.5(b)(5)); details of inspections revealing vulnerabilities (49 C.F.R. §1520.5(b)(6)(i)); threat information (49 C.F.R. §1520.5(b)(7)); information regarding screening equipment (49 C.F.R. §1520.5(b)(9)).

[39] *Gilmore*, 435 F.3d at 1154.

withhold from the public. Moreover, it would collapse a fundamental distinction between certain facts, which the government may under some circumstances withhold from public scrutiny, and the legal basis for government action, which if this Court permits an agency to withhold, opens the door to secret law, secret government, arbitrary action, and the use of unaccountable coercive power against millions of Americans in their daily lives.

CONCLUSION

In this case, the government refuses to disclose the text of a regulation compelling air travelers to present identification. A generally applicable law or regulation that is not disclosed to the public it regulates violates due process, creating the potential for uncertainty and abuse of discretion. Such a regulation is also void for vagueness. Furthermore, the Transportation Security Administration's classification of the regulation as "sensitive security information" is counter to, and fails to serve the purposes of, the law that authorizes such classification.

Mr. Gilmore's petition for a writ of certiorari should be granted so that this Court may have the opportunity to review a secret agency rule that offends the Constitution and implicates the rights of millions of American travelers who are presently subject to arbitrary and unaccountable governmental authority.

Respectfully submitted,

MARC ROTENBERG
Counsel of Record

SHERWIN SIY
ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)
1718 Connecticut Ave., NW, Suite 200
Washington, DC 20009
(202) 483-1140

COUNSEL FOR AMICUS CURIAE

November 13, 2006

Supreme Court, U.S.
FILED
NOV 13 2006
OFFICE OF THE CLERK

No. 06-211

IN THE
Supreme Court of the United States

JOHN GILMORE,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

LUCY A. DALGLISH
Counsel of Record
GREGG P. LESLIE
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

(Additional counsel for amici *listed on inside cover.)*

ADDITIONAL COUNSEL FOR *AMICI*:

Counsel for the American Society of Newspaper Editors:
BRUCE W. SANFORD
BRUCE D. BROWN
MALENA F. BARZILAI
BAKER & HOSTETLER, LLP
1050 Connecticut Avenue, NW, Suite 1100
Washington, D.C. 20036

Counsel for the Society of Professional Journalists:
KEVIN GOLDBERG
COHN AND MARKS LLP
1920 N Street, NW, Suite 300
Washington, D.C. 20036

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Text of the Nation's Laws Constitute a Constitutional Core of Information That Cannot Be Withheld From the Public 4

A. Congress's Statutory Framework for the Transportation Security Administration's Use of Sensitive Security Information Results in the Agency Promulgating Regulations That Constitute Secret Law Unavailable to the Public 5

B. While Public Access to Certain Government Information Used to Craft a Law Can Be Curtailed, Access to the Text of the Law Itself Is Absolute .. 8

C. Courts Routinely Recognize Unrestrained Public Access to the Content of Laws as the Logical Truism Underpinning Every Area of the Law 10

1. The Public's Presumptive First Amendment Right of Access to Criminal Court Cases Would Be Rendered Meaningless Without Public Access to the Law the Government Applies to Individuals 10

2. The Administrative State Would Be Constitutionally Unpalatable if Unelected Executive Agency Officials Were Allowed to Shield From Public Scrutiny Directives Enforced Against Citizens 11

3. Even Copyright Law Mandates That Publishers Need Unfettered Access to the Law to Ensure the Public Has Unhindered Access 13

II. Congress's Recent Attempt to Rein in the Transportation Security Administration's Unchecked Ability to Create Secret Law Does Not Create Any Mechanism for the Press or the Public to Uncover the Text of the Law 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

Building Officials & Code ADM v. Code Technology, 628 F.2d 730 (1st Cir. 1980) 14

Calder v. IRS, 890 F.2d 781 (5th Cir. 1989) 8

Corker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (1981) 9

Cox v. Dep't of Justice, 601 F.2d 1, 5 (D.C. Cir 1976) 9

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 5

Cueno v. Schlesinger, 484 F.2d 1086 (CADC 1973) 9

Davidson v. Wheelock, 27 F. 61 (C.C.D. Minn. 1866) 14

Gordon v. FBI, 390 F.Supp.2d 897 (N.D. Ca. 2004) 6

Houchins v. KQED, 438 U.S. 1 (1978) 5

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 8

Mills v. Alabama, 384 U.S. 214 (1966) 4

Nash v. Lathrop, 142 Mass. 29 (Mass. 1886) 13

North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002) 9

Olmstead v. U.S., 277 U.S. 438 (1928) 17

Panama Refining Co. v. Ryan 293 U.S. 388 (1935) 10, 12

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 7

Press-Enterprise Co. v. Superior Court, (*"Press-Enterprise I"*)
464 U.S. 501 (1984) 10, 11

Press-Enterprise Co. v. Superior Court, (*"Press-Enterprise II"*)
478 U.S. 1 (1986) 10, 11

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 4, 10

Wheaton v. Peters, 33 U.S. 591 (1834) 13

Statutes and Regulations:

Department of Homeland Security Appropriations Act of 2007
§ 525, Pub. L. No. 109-295, 120 Stat. 1355 (2006) 14, 15, 16

49 U.S.C. § 114(s) 5

49 C.F.R. § 1520.5 6

49 C.F.R. § 1520.9 16

49 C.F.R. § 1542.303(f)(2) 6

Other Authority:

BLACK'S LAW DICTIONARY (Bryan A. Garner ed., West
Publishing 2004) (1891) 7

Erwin Griswold, *Government in Ignorance of the Law – A Plea for Better Publication of Executive Legislation*,
48 HARV. L. REV. 198 (1934) 12

GOVERNMENT ACCOUNTABILITY OFFICE, CLEAR POLICIES AND OVERSIGHT NEEDED FOR DESIGNATION OF SENSITIVE SECURITY INFORMATION (2005) 6

Sara Goo, *TSA Faulted for Restricting Information*,
WASHINGTON POST, October 10, 2003, at A11 6

INTEREST OF AMICUS CURIAE[1]

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

---

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

Amici's interest in this case is in preserving the constitutional role of the press in accessing, disseminating and critiquing the nation's laws and monitoring how the government applies those laws to individual citizens. *Amici* urge this court to grant *certiorari* and determine whether the Transportation Security Administration has improperly withheld from the people and the press the text of rules that regulate public conduct.

SUMMARY OF ARGUMENT

The Constitution contemplates a crucial role for the press in accessing, disseminating and critiquing the laws of the United States. *Amici* urge the grant of *certiorari* in this case due to its implications on the constitutional duty of a free press to notify and inform the public of what the law is.

The framework Congress has developed for the Transportation Security Administration's ("TSA") use of sensitive security information ("SSI") allows the executive agency to unconstitutionally withhold the content of laws from the press and the public.

The Transportation Security Administration's identification requirement constitutes a generally applicable law to which the public should have access. Government-imposed rules dictating when a person can board a commercial airliner make up part of the rules regulating public conduct.

Amici argue the text of the laws of our nation constitutes a core of information the public has an absolute right to access and disseminate. While the public may not have access to every piece of information relied upon by the government in drafting security directives, citizens must be privy to the content of the rules the government mandates they follow.

In a nod to this foundational principle of our constitutional system, this Court has universally, if in some places implicitly, recognized the role of the free press in facilitating access to the letter of the law in subject areas ranging from criminal procedure to administrative and copyright laws.

Finally, though Congress recently adopted new rules for disclosure of secret information, those rules will not mandate the openness required for an operative democracy.

ARGUMENT

I. The Text of the Nation's Laws Constitute a Constitutional Core of Information That Cannot Be Withheld From the Public.

This court should grant certiorari and review Mr. Gilmore's case to determine the crucial question of whether sensitive security information policies are so sweeping that they allow the Transportation Security Administration to cloak directives regulating public conduct under the guise of information policy. *Amici* contend they do and the Supreme Court should step in to bring clarity to an issue that has seen a fundamental precept of American democracy sacrificed to a bureaucratic desire for secrecy.

No areas of civic knowledge are more crucial to self-government than the content of government laws and regulations and the administration of justice. The press has an inextricable role to play in informing the public in these areas. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press…to play an important role in the discussion of public affairs."). That role cannot be usurped by an executive agency that unilaterally withholds from public scrutiny the text of its rules that directly impact the lives of millions of Americans.

While the press and the public have congruent rights to government information, courts have repeatedly recognized the reality that representatives of the media more frequently exercise that access and thus serve as a vital conduit of governmental information. *See e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) ("Instead of acquiring information about trials by firsthand word of mouth from those who attend, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the

public."); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.").

As such, when an executive agency enacts and enforces a directive while simultaneously withholding its text from the public whose conduct is regulated, the agency violates foundational concepts upon which this country is built. Simply put, freedom of the press as conceived by the Constitution cannot coexist with secret law. *See Houchins v. KQED*, 438 U.S. 1, 14 (1978) ("The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.").

A. Congress's Statutory Framework for the Transportation Security Administration's Use of Sensitive Security Information Results in the Agency Promulgating Regulations That Constitute Secret Law Unavailable to the Public.

Congress has conferred upon the Transportation Security Administration virtually unchecked authority over information policy, which has resulted in the agency enacting a directive that regulates citizens' actions but simultaneously is withheld from their view. *See* 49 U.S.C. 114(s). The law empowers the Transportation Security Administration to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security" if the Transportation Security Administration decides that disclosing the information would "be detrimental to the security of transportation." *Id.*

The Transportation Security Administration has branded this unclassified material it withholds from the public as "sensitive security information." In its regulations, the agency sets out various categories of information that constitutes sensitive security information. *See* 49 C.F.R. § 1520.5. At the end of the list, the agency includes a catch-all: "any information not otherwise described in this section that TSA determines is SSI." 49 C.F.R. § 1520.5(b)(16). The Transportation Security Administration may distribute sensitive security information, but only to persons with a "need-to-know." 49 C.F.R. § 1542.303(f)(2)

The Transportation Security Administration has taken this broad mandate and run with it. Court decisions, press accounts and government reports all confirm the agency's abuse of its ability to restrict access to unclassified information it deems "secret." *See e.g.*, *Gordon v. FBI*, 390 F.Supp.2d 897, 900 (N.D. Ca. 2004) ("Defendants have offered no justification for withholding such innocuous information."); Sara Goo, *TSA Faulted for Restricting Information*, WASHINGTON POST, October 10, 2003, at A11 ("The Transportation Security Administration is muzzling debate of security initiatives by labeling too many of the agency's policies and reports as too sensitive for public dissemination, according to pilots, flight attendants and consumer advocates."); and GOVERNMENT ACCOUNTABILITY OFFICE, CLEAR POLICIES AND OVERSIGHT NEEDED FOR DESIGNATION OF SENSITIVE SECURITY INFORMATION 7 (2005) ("In addition to lacking written guidance concerning SSI designation, TSA has no policies and procedures specifying clear responsibilities for officials who can designate SSI.") *available at* http://www.gao.gov/new.items/d05677.pdf (Last visited November 1, 2006).

And while the press is able to document some of the Transportation Security Administration's misuse of sensitive security information, the larger story – the text of rules

regulating public conduct the agency is promulgating – goes unreported as journalists are unable to penetrate the agency-erected wall a "sensitive security information" designation constitutes.

There can be no doubt that the Transportation Security Administration's identification requirement constitutes a law generally applicable to the public. Government-imposed rules dictating when a person can board a commercial airliner make up part of "the regime that orders human activities and regulations through systematic application of the force of politically organized society." BLACK'S LAW DICTIONARY 900 (Bryan A. Garner ed., West Publishing 2004) (1891).

People who need to fly in this country must comply with the Transportation Security Administration's identification law, which, as shown by Mr. Gilmore's experiences, may or may not, in fact, require travelers to show government-issued photo identification.

Under the current scheme, whenever sensitive security information is invoked, the contours of the law are unknowable to the public and the press. Without any mechanism to learn the content of the underlying directive, there is no way for the press to accurately publicize – let alone analyze – the precise requirements commanded of the general public. Cut off from the content of the law, the press becomes nothing more than an agent of propaganda that mimics the dictates of government. Further, it is antithetical to the idea of a free society for citizens to merely take the government's word on what the law is. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.'") *quoting Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Though *Lanzetta* and *Papachristou* address the vagueness of criminal statutes, the salient point here is that the text of the law, however unclearly written, was available to the citizens to scrutinize. Mr. Gilmore and other members of the public have no chance to fully understand a law, whether criminal or administrative, that they cannot see.

B. While Public Access to Certain Government Information Used to Craft a Law Can Be Curtailed, Access to the Text of the Law Itself Is Absolute.

In advocating access to the Transportation Security Administration's identification law, *amici* do not purport to go where the courts have not – namely to suggest that the First Amendment gives the press "an unrestricted license to gather information." *Calder v. IRS*, 890 F.2d 781, 784 (5th Cir. 1989).

The issue here is not the gathering of sensitive national security-implicating information. Instead the issue is the ability of a free press to report the contents of legal requirements citizens must comply with in order to fly on an airplane. Even though the First Amendment right to access government information is not unlimited, access to the text of the law must be.

As an initial matter, executive agency officials, and reviewing judges, are frequently called upon to distinguish between generally applicable law that regulates public conduct, which must be disclosed, and information collected by the government that does not regulate conduct, which may be kept hidden in certain narrow circumstances.

In *Corker v. Bureau of Alcohol, Tobacco & Firearms*, the Court of Appeals for the District of Columbia Circuit withheld from public view a Bureau of Alcohol, Tobacco and

Firearms personnel manual because the contents were "not concerned with regulating the behavior of the public." 670 F.2d 1051, 1075 (1981). The court made clear that disclosure would have been mandated had the manual contained more than mere "investigative techniques" for the "internal use" of agency personnel. *Id.* at 1073. "There is no attempt to modify or regulate public behavior only to observe it for illegal activity," the court wrote. *Id.* at 1075. See also *Cox v. Dep't of Justice*, 601 F.2d 1, 5 (D.C. Cir 1976) (Information can be withheld under FOIA exemption only if it "does not purport to regulate activities among members of the public … [or] set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.") and *Cueno v. Schlesinger*, 484 F.2d 1086, 1092 (CADC 1973) ("It is particularly important that information which is in effect substantive law not be concealed beneath a mass of other material.").

The framers of the Constitution recognized the distinction between information used to create the law and the law itself when they nailed the windows shut to keep the public from hearing the debates of the Constitutional Convention. *See North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 210 n.6 (3rd Cir. 2002).

After the convention, authors of the Federalist papers and other journalists and commentators of the day did not rely on an executive summary of the Constitution to inform their opinions on whether it should be ratified. Members of the press praised and critiqued the proposed Constitution's precise language (or lack thereof, in the case of the Bill of Rights). When it came to text of the law of the land, the framers recognized the press and the public were always on a "need-to-know" basis.

C. Courts Routinely Recognize Unrestrained Public Access to the Content of Laws as the Logical Truism Underpinning Every Area of the Law.

This Court has continually recognized unrestrained public access to the law as a logical underpinning in every legal context, ranging from criminal procedure to administrative and copyright laws.

The precise holdings in the following cases do not explicitly articulate a right to access the law. This is hardly because such a principle does not exist, but almost certainly because courts felt that such a fundamental precept need not be stated.

1. The Public's Presumptive First Amendment Right of Access to Criminal Court Cases Would Be Rendered Meaningless Without Public Access to the Law the Government Applies to Individuals.

This court, in a series of cases, has firmly established the presumptive First Amendment right of public access to criminal courts. *See e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("Press-Enterprise II"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-Enterprise I"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S 555 (1980). Underlying this right of access to the courtroom is the unarticulated, yet universal, precept that the public would be able to access the law being applied in these forums of justice.

That Mr. Gilmore does not face criminal charges in this case does not alter the calculus when determining whether he and the press covering his case ought to have access to the law being enforced against him. As the court pointed out when granting the Riverside Press-Enterprise access to a preliminary court hearing in California, it is immaterial to the

question of access that the proceeding in question "cannot result in the conviction of the accused and the adjudication is before a magistrate or other judicial officer without a jury." *Press-Enterprise II*, 478 U.S. at 12.

It would render the meaning of all right-of-access cases absurd if the press could attend a court hearing but simultaneously be cut off from the law and thus have no way of determining whether justice was properly delivered. The United States does not conduct show trials.

Allowing the public's surrogate, the press, access to the text of the law ensures a watchdog is overseeing the government's application of the law when regulating an individual's behavior, both inside the courtroom and out.

"[A] claim to access cannot succeed unless access makes a positive contribution to this process of self-governance." *Press-Enterprise I*, 464 U.S. at 518 (Stevens, J., concurring).

Press access to the law is more than "a contribution" to the process of self-governance; it is its underpinning.

2. The Administrative State Would Be Constitutionally Unpalatable if Unelected Executive Agency Officials Were Allowed to Shield From Public Scrutiny Directives Enforced Against Citizens.

Administrative law jurisprudence also provides a rich vein of precedent for the proposition that the citizens must be able to access the laws of their government.

The need for a Federal Register offers an example of this country's distaste for secret law. The Federal Register was born on March 6, 1936, in direct response to the ill-effect that

inaccessible law manufactured by the burgeoning executive administration wrought on American democracy.

In *Panama Refining Co. v. Ryan*, the Supreme Court prodded President Franklin Roosevelt's administration and Congress to develop a way to put the public on notice as to what laws the executive branch was enacting. 293 U.S. 388 (1935).

The Panama Refining Company sued to enjoin enforcement of certain requirements expected of the company enacted pursuant to the Petroleum Code. The case made its way to the Supreme Court before the parties and the courts learned that the provision the company was suing over had in fact been repealed by an executive order.

Justice Cardozo, in dicta of his dissenting opinion, levied the harshest indictment of an administrative system that allowed such secrecy.

"One must deplore the administrative methods that brought about uncertainty for a time as to the terms of executive orders intended to be law" *Panama Refining Co.*, 293 U.S. at 434 (Cardozo, J., dissenting).

Commentators of the era also decried the lack of transparency in the administrative system with calls for the creation of a mechanism to catalog and distribute the non-penal laws fashioned by executive agencies.

"[A]part from criminal liabilities, the everyday affairs of the citizen are hedged about by a multitude of requirements based solely on some administrative pronouncement." Erwin Griswold, *Government in Ignorance of the Law – A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 203 (1934). "There should ... be no need to demonstrate the importance and necessity of providing a

reasonable means of distributing and preserving the text of this executive-made law." *Id.* at 198

With the invention of a "sensitive security information" regime that allows for binding laws to be shrouded from public view, the legislative and executive branches have taken a step back to the era before the Federal Register, when the public was at the mercy of secret administrative pronouncements. The development is an unwelcome one for journalists seeking to keep the public informed about the law, and repugnant to the Constitution.

3. Even Copyright Law Mandates That Publishers Need Unfettered Access to the Law to Ensure the Public Has Unhindered Access.

Copyright law further illustrates the need for publishers to have a free hand in accessing the law so that it may be distributed to the public.

Some of the nation's early publishers sought exclusive rights to publish the laws being developed in the burgeoning legislatures and courts. Courts stepped in with rulings that firmly established that the law belonged to no single person or publisher, and that all citizens had equal rights to access and publish the law.

"It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public." *Nash v. Lathrop*, 142 Mass. 29, 35 (Mass. 1886). *See also Wheaton v. Peters*, 33 U.S. 591, 593 (1834) ("No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court: and the judges of the court cannot confer on any reporter any such right."); *Building Officials & Code ADM v. Code Technology*, 628 F.2d 730, 736 (1st Cir. 1980)

(referring to "a necessary right freely to copy and circulate all or part of a given law for various purposes."); and *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866) ("The materials for such publication are open to the world. They are public records, subject to inspection by everyone, under such rules and regulations as will secure their preservation.").

This important principle of copyright law reflects how constitutionally inapposite it is to deny publishers, including news media publishers, the ability to report on the text of the law.

II. Congress's Recent Attempt to Rein in the Transportation Security Administration's Unchecked Ability to Create Secret Law Does Not Create Any Mechanism for the Press or the Public to Uncover the Text of the Law.

Congress's latest pronouncement on the use of sensitive security information does not cure the constitutional infirmities of the Transportation Security Administration's practices. *See* Department of Homeland Security Appropriations Act of 2007 § 525, Pub. L. No. 109-295, 120 Stat. 1355 (2006). Three provisions of the law ostensibly open the sensitive security information vault, but they fail to offer any relief to Mr. Gilmore so as to moot his current grievance. *Id.*

First, under this new law, the public and the press will remain in the dark for three years before the Transportation Security Administration is required to justify the continuing necessity for a piece of information's sensitive security information designation. *Id.* at § 525(a)(2)

After three years, the Transportation Security Administration can unilaterally declare that the sensitive security information in question falls into one of a dozen vague categories and

continue the disclosure exemption. *Id.* Three-year-old information that does not fall into one of the protected categories can still be blocked from disclosure if an agency official simply articulates a "rational reason" for its continued secret designation. *Id.* at § 525(a)(2)(A)

While a sunset clause of this nature may be appropriate in the case of classified information that loses its confidential character with the passage of time, the same cannot be said for a set of legally binding rules – the text of the law itself cannot be embargoed.

Second, the press and the public should not be required to ask the government for the law as a necessary prerequisite to its release. Under the new statutory framework, the continued necessity of sensitive security information will be reviewed only "when a lawful request is made to publicly release a document containing" sensitive security information. *Id.* at § 525(a)(1).[2] This procedural step requires either omniscience or dumb luck on the part of the requester, and is hardly equivalent to the kind of check and balance system necessary for sensitive security information.

---

[2] This language is from the provision that states the continuing necessity of a sensitive security information designation will be made upon request at any stage of the document's life cycle, including when it is less than three years old. Department of Homeland Security Appropriations Act of 2007 § 525(a)(1), Pub. L. No. 109-295, 120 Stat. 1355 (2006). After a piece of information becomes three years old, it "shall be subject to release upon request unless," as described supra, the sensitive security information falls into one of the enumerated categories or the Transportation Security Administration articulates a rational reason for its continued sensitive security information designation. *Id.* at (a)(2). Relevant to the argument here is that a requester must *ask* the Transportation Security Administration to review sensitive security information before propriety of the designation will be reviewed and the possibility of disclosure can exist.

Finally, the new law's provisional disclosure exception to certain government-approved civil litigants would neither vindicate Mr. Gilmore's constitutional claims nor would it aid the free press's ability to report the text of the law. *Id.* at § 525(d). Journalists must not be required to initiate a lawsuit in order to determine what laws apply to citizens.

Even if initiating litigation were a permissible prerequisite for the press to acquire otherwise secret law, journalists could not reveal to other citizens what they had learned. Anyone who publicizes the content of a Transportation Security Administration-promulgated law acquired through civil litigation is subject to a $50,000 fine for each disclosure to an "unauthorized person." *See* 49 C.F.R. § 1520.9

Therefore, the new regulations do not cure the constitutional violations constituted by the Transportation Security Administration's use of sensitive security information. More importantly for *amici*, the new law offers no hope for the press to uncover secret law.

CONCLUSION

Congress, in reaction to the horrific airline hijackings of September 11, 2001, has given the Transportation Security Administration virtually unchecked discretion to withhold information from the American public. But in its zeal for secrecy, the Transportation Security Administration has sidestepped the Constitution, concealing the content of the law from the press and the public. *Amici* do not question the intentions of the government, only the ill-effects that come with the denial of access to the text of the laws by which we are governed.

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

Mr. Gilmore's petition for a writ of *certiorari* should be granted.

LUCY A. DALGLISH
Counsel of Record
GREGG P. LESLIE
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1101 Wilson Boulevard, Suite 1100
Arlington, VA 22209
(703) 807-2100

November 2006

Additional counsel for amici *listed on inside cover.*